Volume 66
Number 1
Spring 2009

GUILD PRACTITIONER

A journal of legal theory and practice "to the end that human rights shall be more sacred than property interests."

—Preamble, NLG Constitution

NATIONAL LAWYERS GUILD

EDITOR'S PREFACE: ON THE TORTURE LAWYERS

In this issue we attempt to understand the madness of the past eight years of U.S. interrogation policy in the "war on terror."

At the second annual National Lawyers Guild Convention in 1938 an upwardly mobile guild member named Robert H. Jackson rose to champion "an economic bill of rights that will protect our people from irresponsible exercise of economic power, just as past generations worked toward the constitutional bill of rights which has long restrained the irresponsible exercise of political power."[1]

Just eight and a half years later Supreme Court Associate Justice Robert H. Jackson gave the opening argument before history's most famous military tribunal at Nuremberg. Goring, Hess and other ruthless Nazi sadists and voluptuaries, now disgraced criminal defendants awaiting their fate, listened as Justice Jackson explained the purpose of a trial that many hoped marked the beginning of a new era of world morality. "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people," Justice Jackson explained. "It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."[2]

Sixty-five years later Charles Graner and Lynndie England, two scantily educated reservists with anonymous backgrounds, are convicted criminals facing public stigma for their perverse misdeeds at Abu Ghraib. But John Yoo and Jay Bybee, two of the Bush administration attorneys who did the most to create this era of torture, continue to enjoy positions of prestige, power and remuneration. The former is a tenured professor at the University of California, Berkeley's School of Law (aka Boalt Hall). The latter is a federal appellate court judge with a lifetime appointment.

Reasonable minds have little patience for Nazi analogies in contemporary political discourse, the so-called *reductio ad Hitlerum*. They are as tedious as they are unhelpful. There was only one Nazi Germany and we, thank God, don't live

Guild Practitioner is published quarterly by Guild Practitioner, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are $50/yr for libraries and institutions; $25/yr for lawyers; $10/yr for legal workers/law students; $5/yr for incarcerated persons; add $5/yr for overseas; $6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: **Guild Practitioner**, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, **Guild Practitioner**, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. **Guild Practitioner** is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, the Alternative Press Index and in A MATTER OF FACT.

in it. However, that doesn't at all negate the impact and applicability of Justice Jackson's words at Nuremberg to America's torture lawyers. Yoo, Bybee and their ilk are the most dangerous and morally opprobrious kind of legal advisers the American legal system has ever produced: sycophantic courtiers who used their superior legal training to serve and embolden an executive branch determined to wage a campaign of aggressive war that knew no temporal, geographic or moral limits. The "war on terror" was going to be endless, borderless and, had the Supreme Court adopted the theories of Yoo, Bybee and the other Bush administration attorneys, vitually lawless. They were not caught grappling in the fog of war with impossible and unprecedented moral and legal complexities, as Yoo so often claims in his countless television interviews. On the central issue of torture they turned their collective backs on the law—the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Geneva Conventions; the U.S. War Crimes Act, et al.

It is all the more galling that the federal government, feigning outrage, sought to conceal its zealous implementation of Yoo-and-Bybee-type torture with an act of class exploitation and scapegoating against the pathetic shutterbugs of Abu Ghraib, whose primary fault was using (and photographing) for themselves many of the techniques the torture lawyers had deemed legal only for others. Yoo, Bybee and the others served the interests of power and not only have escaped the law but continue to live above it—and in the case of Bybee will continue to shape and define it from the bench as long as he sees fit. Meanwhile "little people" like Graner and England, the students-playing-guards in the Bush administration's reenactment of Zimbardo's Stanford Prison Experiment, remain under its heel. Contrasting the likes of Yoo and Bybee with that of Graner and England we see the two abovementioned speeches of Justice Jackson, one on the crimes of the rich and powerful against the poor, the other on the need to punish criminal policymakers as well as footsoldiers, coalesce perfectly.

It is now plain that, barring the discovery of new facts, President Obama will do nothing to bring the torture lawyers to justice. There will be no disciplinary action of any kind, let alone any criminal prosecutions. Despite the fact that an extensive investigation by the The Department of Justice's Office of Professional Responsibility concluded in its exhaustive memo of July 29, 2009 that Yoo had engaged in "intentional professional misconduct" and that Bybee showed a "reckless disregard" for his duty, the OPR recommendation for disciplinary action was countermanded by Associate Deputy Attorney General David Margolis in his memo of January 5, 2010.[3] Those of us who doubted whether the "change" candidate Obama promised during his campaign in 2008 would extend very far into this issue are now coping with the sting of their own vindication.

However, all hope of the torture lawyers answering for their crimes (and torts) is not lost. In an attempt to expose the truth, construct an accurate historical record and lay blame where it belongs, the mother of convicted would-be dirty bomber and torture victim Jose Padilla has filed suit against Yoo in U.S. District Court, Northern District of California, claiming a causal link between the coun-

Continued inside the back cover

JEFFREY S. KAYE

ISOLATION, SENSORY DEPRIVATION, AND SENSORY OVERLOAD: HISTORY, RESEARCH, AND INTERROGATION POLICY, FROM THE 1950s TO THE PRESENT DAY

Over the past several years, a controversy has arisen over the use of medical and psychological personnel for the purposes of interrogating prisoners in the United States "war on terror." Recent revelations, including the release of the CIA Inspector General's 2004 Report on the CIA's interrogation program, led the human rights organization Physicians for Human Rights (PHR) to conclude that doctors, psychologists and other health professionals designed, implemented and helped supervise "a worldwide torture program" following 9/11.[1] Much of the criticism of this program, and its putative legality or illegality, has focused on dramatically abusive forms of coercive interrogation, such as waterboarding. Less well known, but perhaps just as injurious to its victims, are practices such as long-term isolation, sensory deprivation, sensory overload or over-stimulation, and sleep deprivation.[2] These techniques, along with use of fear, constitute psychological torture. They are exaggerated forms of common psychological phenomena, exercised precisely to break down the psychological defenses of an individual.

This article presents a brief historical summary of the research into forms of coercive persuasion, primarily sensory deprivation, conducted 35-50 years ago, in which psychologists, psychoanalysts, and psychiatrists worked for the CIA and the Pentagon to understand and implement these techniques. As a result of this research, sensory deprivation, prolonged isolation, and later, sensory overload became an integral part of the U.S. coercive interrogation paradigm. The primary document summarizing and implementing this material, constructing a comprehensive interrogation program, was the CIA's 1963 KUBARK Counterintelligence Interrogation manual, declassified in 1997 (KUBARK was an alternate in-house name for CIA.)[3]

This article is presented in the context of a controversy within American Psychological Association (APA), over psychologist participation in interrogations.[4] The struggle within APA over this issue has been fought in a number of resolutions, as well as the constitution of the organization's ethics code. In the background of the controversies, there exists the presence of a decades-long history of psychologist participation in research on these methods on psychological torture.

Jeffrey S. Kaye, Ph.D is a licensed psychologist in private practice in San Francisco, CA, who also serves as a clinician for Survivors International, a torture treatment center also in San Francisco. He currently writes on the torture scandal and other subjects for the websites *Firedoglake* and *Truthout*.

The result of such research has resurfaced years after its initial KUBARK operationalization. For instance, the use of isolation and sensory deprivation at U.S. foreign prisons and at the detainee facility at Guantanamo Bay has been well documented.[5] Even more recently, the Obama administration's Interrogations Task Force has recommended use of the 2006 Army Field Manual (AFM) as a standard reference for appropriate interrogation techniques,[6] despite complaints by human rights organizations such as PHR, Center for Constitutional Rights, and Amnesty International.[7] The AFM's Appendix M describes a complex group of procedures under the single title, "Separation." This technique includes use of isolation, partial sensory deprivation, sleep deprivation, and manipulation of new and old fears, and is restricted to use with "unlawful enemy combatants."[8]

In the years before and for some time after the adoption of the KUBARK manual, there were hundreds if not thousands of research articles written in psychological and other behavioral and medical research journals on the topic of sensory deprivation and sensory disruption in general.[9] Papers were presented as well at numerous conferences. By the mid-to-late 1970s, the explosion in research on sensory deprivation topics trailed off precipitously. The last presentation on the subject at an APA convention appears to have been in 1969.[10]

The format of this article will only allow for a summary of the work done, concentrating on the results from a number of studies, including both controlled psychological and neuroscientific experiments and naturalistic observational studies. One obvious limitation to this research was the lack of any controlled experiments upon actual interrogation subjects. A less obvious but more serious problem concerns lack of access to classified materials and studies. Much of the research was done by intelligence and military entities and kept secret. While some materials have surfaced in recent years,[11] much of the classified material was ordered destroyed in 1973 by then CIA director Richard Helms and Sidney Gottlieb, head of CIA's Technical Services Staff and chief of clandestine programs in mind control. Only by accident were portions of this material ever recovered.[12]

Historical Background

Concentrated psychological research into the manipulation of sensory and perceptual stimulation began early in the Cold War between the U.S. and communist nations in the late 1940s to early 1950s. Historian Alfred McCoy has recently documented the initial contacts leading to creation of the sensory deprivation governmental research program.

> In 1951, the CIA launched a determined search for offensive mind-control methods in close collaboration with its British and Canadian allies….
>
> Consequently, in the words of a Canadian inquiry by George Cooper, QC, "a high-level meeting took place at the Ritz Carlton Hotel in Montreal on June 1, 1951." Attending were Sir Henry T. Tizard, the influential senior scientist from the UK Ministry of Defense; Dr. Omond Solandt, head of Canada's Defense Research Board (DRB); Dr. Donald O. Hebb, head of the DRB's Behavioral Research and

> chair of psychology at McGill; and two Americans, Dr. Caryl Haskins and Commander R.J. Williams. These latter two were identified, in a "handwritten note" found in DRB files, as "CIA."[13]

The subsequent research studies were conducted at McGill University in Montreal. Donald Hebb, a past president of the American Psychological Association and an important researcher and theoretician in psychology, was an early researcher into sensory deprivation's effects upon adult human beings. Although Hebb received approximately $10,000 from the Canadian Defence Research Board between the years 1951-1954 for his work,[14] most of the actual research was done by his assistants, Woodburn Heron, W. H. Bexton, T. H. Scott, and B. K. Doane. The impetus for the research was kept secret, a matter of some protest by Dr. Hebb. He explained what happened at a Harvard symposium on sensory deprivation in June 1958.[15]

> The work that we have done at McGill University began, actually, with the problem of brainwashing. We were not permitted to say so in the first publishing…. The chief impetus, of course, was the dismay at the kind of "confessions" being produced at the Russian Communist trials. "Brainwashing" was a term that came a little later, applied to Chinese procedures. We did not know what the Russian procedures were, but it seemed that they were producing some peculiar changes of attitude. How?
>
> One possible factor was perceptual isolation and we concentrated on that.[16]

Besides the work at McGill, other centers of extensive research on sensory deprivation during the period under consideration include U.S. and Canadian sites, including, but not limited to: Princeton University; the National Institute of Mental Health in Bethesda, Maryland; Boston City Hospital and Harvard University; Duke University; the Human Resources Research Office in Monterey, California; the Naval Medical Research Institute in Bethesda, Maryland; the University of Manitoba; the University of Michigan, Ann Arbor; the Research Center for Mental Health at New York University, headed up by psychoanalysts Robert R. Holt and Leo Goldberger; the Albert Einstein Medical Center in Philadelphia; Allen Memorial Hospital in Montreal; Richmond, Virginia VA Hospital; the University of Pittsburg; the VA Hospital at Oklahoma City; Case Western Reserve University in Cleveland; Rutgers University; Cornell University; Yerkes Laboratories of Primate Biology; in addition to international academic sites in Italy (Bologna University), Japan (Tohoku University), Prague (Psychiatric Research Institute), and, reportedly, elsewhere.[17] (Solomon 1961; Zubek 1969).

Much of the work on behavioral science during this period, such as the U.S. Army's Task ENDORSE,[18] was funded by military and intelligence organizations. "Nearly every scientist on the frontiers of brain research found men from secret agencies looking over his shoulders, impinging on the research."[19]

University of Virginia bioethicist Jonathan Moreno, writes:

> To a great extent, modern psychology and social science were founded on the financial support they received from national intelligence agencies during and after World War II…. These close ties remained after hostilities against the Axis

> powers ended. In the early 1950s, nearly all federal funding for social science came from the military, and the Office of Naval Research was leading sponsor of psychological research from any source in the immediate postwar years. The CIA found ways to support large number of Ivy League academics, often without the professors' knowledge, as its funds were passed through dummy foundations that often gave grants to other foundations.[20]

As a result, much of this research was shrouded in secrecy, which is, as already noted, a problem in assessing the overall impact and extent of the work done. That this secrecy may still continue is another obstacle in our understanding the subject at hand. Revelations surrounding this work continue to surface, such as journalist Louis Porter's 2008 investigation on CIA mind control research at Vermont State Hospital in the 1960s.[21]

This contrasts with a brief history of the importance of military psychology and its division within APA presented at a meeting of the Division of Military Psychology in September 1969, where military psychology was presented as a field with very little power in the APA apparatus, with "so few APA members [who] would allocate their votes to Division 19 that Military Psychology would lose its two seats on Council", one psychologist warned.[22] The same source notes that "[o]bservations on the effects of a particular type of stressful environment —sensory deprivation and social isolation—have been extensively conducted and reported under Army and Navy auspices since the 1950s."[23]

By the mid-1970s, there was a steep drop-off in published literature on sensory deprivation. The reason for this is unknown, but could be due to controversies over revelations of these and other programs by the military and CIA (Greenfield 1977). The decline in research coincides with the cancellation of the CIA's MK-SEARCH program in June 1972. A direct participant in the sensory deprivation and LSD research of the 1950s and 1960s gave an alternate explanation: the original expansion of research in the field represented a "bandwagon effect," and that subsequent work lost steam, drowned by "statistical refinements and ridiculous variations (such as a 30 minute sensory deprivation, instead of at least 8 hours) to the point of tedium."[24]

However, the use of isolation and sensory deprivation was continued by U.S. intelligence agencies, as evinced by the CIA's 1983 Human Resource Exploitation Training Manual (HRETM).[25] The manual explains, "The purpose of all coercive techniques is to induce psychological regression in the subject by bringing a superior outside force to bear on his will to resist."[26]

HRETM goes on to list "three major principles involved in the successful application of coercive technique:" debility, or the induction of physical weakness in the prisoner, through prolonged constraint and/or exertion, by exposure to extreme temperatures, and via deprivation of food and sleep; dependency upon the interrogator for all the prisoner's basic needs; and sustained exposure to fear or dread.[27] This state of debility-dependency-dread is described in the literature by its acronym DDD, and was observed as early as the 1950s.[28]

As regards deprivation of sensory stimuli, the CIA training manual explains that "Solitary confinement acts on most persons as a powerful stress," that it produces "unbearable" anxiety for most subjects.

> How much they are able to stand depends upon the psychological characteristics of the individual…. As the "Questioner" becomes linked in the subject's mind with human contact and meaningful activity, the anxiety lessens. The "Questioner" can take advantage of this relationship by assuming a benevolent role….
>
> Some subjects progressively lose touch with reality, focus inwardly, and produce delusions, hallucinations, and other pathological effects.[29]

Experimental Research Findings

The conclusions of the anonymous authors of HRETM are congruent with many of the findings of psychological and psychiatric researchers over the previous three to four decades. Psychologist Jack Vernon examined the effects of sensory deprivation and isolation on a group of eighteen volunteer graduate students at Princeton University and reported the results to a symposium of behavioral scientists at Harvard in 1958. He found that sensory deprivation had "a significant and essentially deleterious influence upon the subjects" in tests measuring rotary pursuit ability, color perception, motor coordination, mirror tracing, body weight, and galvanic skin resistance.[30] The longer the period of sensory deprivation, the more marked the influence of that variable.

An early problem, which called for some explanation, was the drop-out rate among volunteers in the sensory deprivation experiments. In one experiment, reported by psychologist Woodburn Heron, only eighteen of twenty-four subjects stayed in the isolation setting long enough to complete the testing.[31] Heron was using a schedule of two to three days of isolation and sensory deprivation. Other studies showed that psychotic symptoms could be produced in volunteers within twelve to thirty six hours, and many studies had high drop-out rates due to the discomfort of the procedure.[32]

Vernon, using an even more extreme protocol for exteroceptive perceptual deprivation, e.g. no light, very reduced noise, etc., with exposure times of up to four days, had a quit rate of approximately twenty percent over the years, utilizing approximately 100 volunteer students from the local university. Even more interesting, perhaps, was Vernon's finding that when, one summer, they recruited subjects from outside the geographical area, quit rates grew precipitously. In fact, so many quit that the experiment had to be abandoned. Vernon speculated that the higher drop-out rate was due to the "strangeness" of the experiment environment.[33] "They could easily distrust [the researchers], could easily find the situation disagreeable, and could easily imagine undesirable consequences to continued confinement. Their elements of doubt may have rendered S.D. considerably more intolerable….Thus strangeness of environment may be a critical factor, the force of which could be increased almost indefinitely."[34]

In the early research literature, one outstanding feature was the variability of results across experimental conditions. In part this was due to a lack of standardiza-

tion of variables, of controls, and even of definitions.[35] A dramatic example was the appearance of hallucinations in the early McGill studies. In one early study, Hebb's researchers reported twenty-five of twenty-nine subjects experienced "some form of hallucinatory activity."[36] Subsequent researchers found this frequency often difficult to replicate, with some studies reporting no hallucinations among subjects at all.[37]

One finding that held across multiple experiments was the susceptibility of the deprivation subject to suggestibility.[38] One researcher, Peter Suedfeld, concluded:

> Susceptibility to external influence, including both primary suggestibility and persuasibility, is clearly increased by SD. The data indicate that this phenomenon originates with the lack of information anchors in the SD situation: the subject is at loose ends, without guidelines for his behavior, unable to concentrate, and in a state of stimulus- and information-hunger…. This condition has the effect of maximizing the impact and the reward value of whatever information is made available to him.[39]

Suedfeld also found intelligence and personality variables made a difference. Subjects who had difficulty generating internal cognitive structure showed stronger susceptibility to suggestion, while more intelligent subjects could sometimes exhibit resistance to attempts at suggestion.

The question of personality variables and their influence upon isolation and deprivation results was tackled early on. Goldberger and Holt found that the ability to handle primary process internal stimuli, as well as other measures of ego-strength, separated individuals better able to adapt to sensory deprivation and isolation environments from individuals who scored low on these variables.[40] These results were consistent with others, including a pre-World War II survey of psychiatrists.[41]

> Although the causal relationship of isolation to psychotic disorders has long been accepted as practically axiomatic, just how much of personality disorganization is due to isolation merely, and how much is due to a life history of nervous instability, remains the question. Organic condition; background of experience and habit, attitudes of resentment, guilt, or shame toward the past and worry or dread toward the future; a resourceless mental condition devoid of sublimative and assimilative interests—all these are among the factors which are provocative of mental abnormality in the isolated setting.[42]

Other individual correlates considered relevant to demonstrative individual differences include rapid perceptual satiation,[43] field dependence, i.e., a tendency toward wholistic vs. analytic thinking, lower baseline excretion of adrenaline, and relatively high scores on MMPI scales measuring manic-like behaviors and societal alienation or antisocial feelings. Overall, the U.S. government found such individual differences, particularly the influence of personality variables, to be very important in planning interrogations, and a large part of psychologist participation in interrogations is related to personality assessment.[44]

Over the years, researchers discovered other effects of the sensory deprivation situation. These included unexplained weight loss, a progressive slowing of EEG

activity, and changes in perceptual motor functioning. The latter is demonstrated by a significant deterioration in Bender Gestalt tests answers regarding form quality, leading one researcher to conclude that the evidence was substantial; "both simple and complex measures of visual and motor coordination are adversely affected by sensory and perceptual deprivation."[45] Cognitive tests show that while highly structured performance and learning are not seriously affected by sensory deprivation (with the possible exception of list learning), "considerable impairment occurs on unstructured behaviors such as projective test performance."[46]

Another finding often replicated was that sensory deprivation increases sensitivity to pain, at least in its initial stages.[47] At a symposium held in April 1956 by the Group for the Advancement of Psychiatry, researcher Harold Woolf reported:"We also have reason to believe that the painful experience is one that has a highly symbolic significance and is closely linked with feelings of isolation and rejection, especially when imposed by other human beings under hostile circumstances."[48]

Two articles from the late 1950s and early 1960s were key to this research. The first is a paper from the 1958 Harvard symposium, where Ruff, Edwin and Thaler described various reactions to reduced sensory input.[49] Examining both military and civilian volunteers at experiments done at Wright-Patterson Air Force Base in Ohio, they described a series of eight experiments utilizing varying levels of sensory deprivation and conditions of isolation. They found that by the last experiment, in which the conditions allowed the least specific amount of structuring of time duration, communication, or other activities, nine of the subjects terminated the experiment early, unable to tolerate the conditions of the procedure and displaying "impending or partial breakdown of defenses."[50] The authors concluded:

> Many effects of isolation not only increase with time, but also with the indefiniteness of the procedure. If the subject knows in advance how long the experiment will last, he finds it easier to tolerate…. Although no studies have yet been reported in which the subject is not allowed to leave the chamber if he "wants out", it seems likely that such an experiment would produce behavior unlike that observed where an escape route is available.[51]

Ruff et al. found that there were three phases to a subject's experience under SD conditions. In this, his findings were similar to Vernon.[52] An initial brief phase of anxiety is followed by a period in which "subjects structure the experiment in terms of their accustomed patterns of experience." As the experiment is prolonged, a third phase produces a state of heightened anxiety and thought disorganization, "marked by discomfort and concern over the inability to conduct directed thought."[53]

> Defenses are now less effective and seem increasingly primitive. The subject feels restless, and may ask that the experiment be terminated…. These individuals usually dislike the experience, and may voice strong negative opinions regarding the experiment and the experimenters. Depression is not often seen, but somatization and querulous, defensive irritability are common.

> Months later such a subject may be noted making a determined effort to avoid the experimenters.[54]

The avoidance behaviors of subjects after the experiments are suggestive, though not conclusive, of a post-traumatic syndrome engendered in some of these subjects. The researchers conclude that isolation and sensory deprivation destructures the subject's environment, either through lowering proprioceptive information or depatterning it. While the subject tries to create a sense of continuity with reality by drawing upon internal resources, and thereby giving meaning to the situation, the situation is rendered "tolerable only as long as the sense of continuity is maintained."[55]

In the second key article, which was written for the book *The Manipulation of Human Behavior,* Lawrence Hinkle, Jr. described how isolation and sensory deprivation could produce a state of disordered brain function (DBF) or organic brain disturbance similar to that produced by disturbance of brain homeostasis through fever, hypothermia, dehydration, blood abnormalities, shock, hemorrhage, vomiting, and starvation. Individuals with DBF experience thinking difficulties, along with "illusions, delusions, hallucinations, and projective or paranoid thinking."[56] As the DBF condition worsens, confabulation and suggestibility increase, while intellectual functions deteriorate. Judgment becomes unreliable, as does memory function. The entire sensorium become "increasingly clouded", advancing "to the borderline of the pathological."[57]

Hinkle describes how the use of isolation, sensory deprivation, sleep deprivation and fatigue combine to create a DBF syndrome. He explains that the brain does not function normally when it is deprived of "patterned, meaningful, sensory input from the external environment, and some opportunity to organize its output as behavior."[58] Loss of effective performance in complex tasks, of cognitive orientation, of memory abilities, and of judgment (Dr. Hinkle is not considering affective symptoms here) under conditions of isolation, sensory deprivation, sleep deprivation and fatigue are consistent with those of organically produced DBF, although there is greater variability in individual response.[59]

Hinkle concludes:

> From the interrogator's viewpoint it has seemed to be the ideal way of "breaking down" a prisoner, because, to the unsophisticated, it seems to create precisely the state that the interrogator desires: malleability and the desire to talk, with the added advantage that one can delude himself that he is using no force or coercion…. However, the effect of isolation on the brain function of the prisoner is much like that which occurs if he is beaten, starved, or deprived of sleep.[60]

Sensory Overload

While there was a multitude of studies on isolation and sensory deprivation, studies on excessive sensory stimulation were far fewer, and less focused.[61] Adam Lipowski conducted a literature review of the research extant some 30 years ago.[62] He reported on some of the work of the Japanese researchers at Tohoku University,

whose reports echoed some of the methodological difficulties of the deprivation researchers in the U.S. Their results, however, were significant.

The Tohoku workers exposed their experimental subjects to intense auditory and visual stimuli presented randomly in a condition of confinement ranging in duration from three to five hours. The subjects showed heightened and sustained arousal, found sensory overload more aversive than deprivation, and had mood changes in the direction of aggression, anxiety, and sadness. Two subjects reported "hallucinationlike" phenomena.[63]

These findings were replicated by U.S. researchers, with one researcher finding that 40 percent of subjects reported mild to profound disturbances in reality testing. Researchers Haer and Gottschalk found exposure to sensory overload "elicited some degree of brain dysfunction and a tendency toward modes of thinking and behavior associated with schizophrenia."[64] A student of Gottschalk's noted that "excessive chronic stimulation is held to be involved in the production of symptoms in a variety of pathological conditions."[65] In his own study, he found that exposure to sensory overload conditions produced significant differences between subjects on scales of social alienation-personal disintegration and cognitive-intellectual impairment "Specifically, the speech content of subjects who received the sensory overload condition approximated that of persons characterized as schizophrenic or cerebrally impaired."[66]

Joachim Wohlwill distinguished five dimensions of the sensory deprivation and overload conditions: level, diversity, patterning, instability, and meaningfulness. He suggested that a paucity of patterned stimuli information could overcome the individual's ability to encode information, and thereby increase stress.[67] An earlier researcher, Plutchik, found that literature from the 1940s and 1950s was practically unanimous in finding that high intensity noise "will generally produce symptoms of discomfort, irritability, and distraction," in addition to changes in blood pressure, gastric secretion, respiration, EEG, and blood-oxygen saturation.[68]

Recently, Physicians for Human Rights and Human Rights First published a summary of current findings on the effects of a number of interrogation techniques.[69] They concluded:

> Use of lights and loud music is intended to cause physiological distress and encourages disorientation and withdrawal from reality as a defense. The body can interpret certain noises as danger signals, inducing the release of stress hormones which may increase the risk of heart disease or heart attack. Loud music can also cause hearing loss or ringing in the ears; these consequences can be both short term and chronic, with chronic tinnitus, or ringing in the ears, being more common. Strobe lights may also induce a stress response with increased heart rate according to data from studies. In studies involving professional drivers, headlight glare was shown to increase blood pressure, especially in drivers with underlying cardiac disease. Adverse effects of headlight glare in the laboratory include electrocortical arousal, EEG desynchronization, a rise in diastolic blood pressure and even ventricular arrythmias, potentially life threatening electrical rhythm disturbances of the heart. Loud noise and bright lights can also be used to interrupt sleep, resulting in sleep

deprivation and its associated health effects.[70] Use of sensory overload has been a technique utilized by SERE schools, and has reportedly been used by U.S. military and intelligence interrogators abroad.[71] (SERE stands for Survival, Evasion, Resistance, and Escape, and is a military training program meant to inoculate selected military personnel against the rigors of enemy capture, imprisonment, and torture. Its origins as a military program postdate the Korean War.[72]

Sensory manipulation, torture, and the 21st Century U.S. torture program

It is evident that much of the effects of sensory and perceptual manipulation depend upon the context of the environment and the meaning a subject ascribes to it, what Vernon called the "strangeness of environment."[73] The Russian psychologist, Lev Vygotsky, described the situation with young children in 1933, wherein:

> Experiments and day-to-day observation clearly show that it is impossible for very young children to separate the field of meaning from the visual field because there is such intimate fusion between meaning and what is seen. Even a child of two years, when asked to repeat the sentence "Tanya is standing up" when Tanya is sitting in front of her, will change it to "Tanya is sitting down."[74]

This dynamic between the sensory stimulus and the "field of meaning" in which it arises was ignored by those who attempted to transfer the various torture techniques of the SERE program—pronouncing them "safe" for use upon prisoners—disregarding the different contextual environment in which the "technique" was to be used-to use on actual prisoners. Various torture techniques were explicitly approved as late as 2007, not because they were found safe for use on prisoners, but because the CIA found "no significant or lasting medical harm had resulted from the use of these techniques on U.S. military personnel over many years in SERE training."[75] In fact, the military had conducted no long-term scientific follow-up studies of the effects of SERE training on U.S. military personnel. However, published studies on SERE subjects—including those conducted by a CIA researcher—showed significant and profound negative physical and psychological effects.[76]

The use of sensory deprivation during CIA interrogations is also documented in other Office of Legal Counsel memos to the CIA. The procedure for the "prototypical interrogation" was documented:

> According to the *Background Paper*, before being flown to the site of interrogation, a detainee is given a medical examination. He is then "securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods" during the flight….

In a "prototypical interrogation," the detainee begins his first interrogation session stripped of his clothes, shackled, and hooded, with the walling collar over his head and around his neck.[77]

Hooding is "a form of sensory deprivation aimed at causing dislocation and confusion. Research shows that prolonged sensory deprivation can result in depression, depersonalization and psychosis."[78]

> According to the ICRC report, hooding, and other observed sensory deprivation techniques resulted in "signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behavior and suicidal tendencies."[79]

The CIA was not the only state agency pushing the reverse-engineering of SERE techniques for use in coercive interrogations. The Pentagon was interested in doing much the same thing.[80] The memorandum, referenced in Sen. Levin's statement to the Senate Armed Services Committee,[81] described the migration of SERE techniques from the various SERE schools to operational areas of "offensive" use.[82]

One such place was the prison camp opened at Guantanamo Bay Naval Base in late 2001. A recently released SERE Standard Operating Procedure memorandum from Joint Task Force, Guantanamo (JTF-GTMO) describes the rationale for use of the SERE techniques (emphasis added):

> This SOP document promulgates procedures to be followed by JTF-GTMO personnel engaged in interrogation operations on detainee persons. The premise behind this is that the tactics used at military SERE schools are appropriate for use in real-world interrogations. These tactics and techniques are used at SERE school to "break" SERE detainees. *The same tactics and techniques can be used to break real detainees during interrogation operations.*[83]

Another document from Guantanamo, the 2003 version of the Camp Delta Standard Operating Procedures, also draws upon the use of isolation and sensory deprivation, noting in section 4-20:

> The purpose of the Behavior Management Plan is to enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process. It concentrates on isolating the detainee and fostering dependence of the detainee on his interrogator.[84]

The isolation included restrictions against visits by chaplains or the International Red Cross and a prohibition on reading materials. The period of isolation is to last for four weeks, or "[u]ntil the JIG commander changes his classification."[85] The element of sensory deprivation comes from the impoverished environment allowed the detainee. The idea of fostering dependence upon the interrogator was discussed earlier in conjunction with the CIA's HRETM manual.[86]

The training of isolation and sensory deprivation techniques at Guantanamo was deliberate. A letter released by the Senate Armed Services Committee written by two SERE trainers to the Officer in Charge at the Navy SERE School in Brunswick, Maine, described the training given to Guantanamo interrogators, including "an in-depth class on Biderman's Principles, and the theory and practical application of selected physical pressures…"[87]

These "Principles" included the use of "Isolation," which is described as a technique that deprives the prisoner of all social support and "ability to resist". It "makes [the] victim dependent upon [the] interrogator." Furthermore, isolation can be complete, semi, or "group isolation.'[88] Another technique taught at

Guantanamo was labeled "Monopolisation of Perception.**"** This is described as "physical isolation. Darkness or bright light. Barren environment. Restricted movement. Monotonous food." The interrogator's goal is said to be fixating the prisoner upon his "immediate predicament", by "eliminat[ing] stimuli competing with those controlled by captor," frustrating all action "not consistent with compliance."[89]

A final example of contemporary use of isolation and sensory deprivation in U.S. interrogations is, as mentioned above, the current version of the Army Field Manual (AFM).[90] The Army incorporated use of isolation and sensory deprivation in Appendix M ("Separation") of the AFM, all the while denying it was doing so. While publicly and within the manual itself, the Army eschewed the use of sensory deprivation, a close reading shows the same use of sensory restrictions and isolation. Certainly, the military is sensitive to the fact it is using controversial and potentially harmful techniques, at one point stating, "separation is particularly sensitive due to the possibility that it could be perceived as an impermissible act."[91]

The AFM lists a preference for "physical separation" of prisoners into solitary confinement, but allows the "field expedient" type of separation when the former is not feasible.[92] "Field expedient" separation is defined as the use of "goggles or blindfolds and earmuffs" used to "generate a perception of separation."[93] (This is different than hooding, which is banned by the AFM.)

> Detainees must be protected from self-injury when field expedient means of separation are used. The effect of the application of field expedient separation means on the detainee must be monitored to detect any possible health concerns.[94]

While physical separation may be used for thirty days, with possible extensions, the "field expedient" form of sensory deprivation is "[l]imited to 12 hours of initial duration at the initial interrogation site," not including "the time that goggles or blindfolds and earmuffs are used on detainees for security purposes during transit and evacuation." As with the method of "physical separation," "field expedient" sensory deprivation could be prolonged beyond 12 hours.[95] As we saw earlier in this paper, even relatively brief periods of sensory deprivation could bring about deleterious symptoms even in experimental volunteers, who can be expected to have less anxiety than prisoners undergoing the "shock of capture."

Conclusion

The use of sensory deprivation and overload, when considered from a medical standpoint, constitutes torture, and is outlawed by international treaties and agreements, and illegal under U.S. law, in particular the War Crimes Act and the Torture Act. "The lasting depression and posttraumatic stress disorder that victims of isolation suffer constitute the prolonged and/or non-transitory mental harm required for mental pain to be considered severe or serious. Moreover, isolation and sensory deprivation in interrogations is likely calculated to 'disrupt the senses or personality.'"[96] The APA maintains that the presence of professional

psychologists protects against the prevalence of such abuse. Opponents of this position strenuously disagree.

U.S. society appears to be conflicted over what to do about the presence of torture among its armed forces and intelligence agencies. The longer it takes to bring legal resolution to these issues, to end the practice of torture and cruel, inhuman, and degrading treatment of prisoners, the more the society itself becomes degraded. The psychological and psychiatric communities in particular have been complicit, as this article shows, in the research and implementation of torture by the U.S. government. This is an urgent problem that society must address with all its resources, and doctors and psychologists in particular must take steps to clean up their professions.

NOTES

1. PHYSICIANS FOR HUMAN RIGHTS, AIDING TORTURE: HEALTH PROFESSIONALS' ETHICS AND HUMAN RIGHTS VIOLATIONS DEMONSTRATED IN THE MAY 2004 INSPECTOR GENERAL'S REPORT (2009) [hereinafter AIDING TORTURE].
2. PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES. (2005).
3. COUNTER INTELLIGENCE AGENCY, KUBARK COUNTERINTELLIGENCE INTERROGATION (1963) [hereinafter KUBARK], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/01-01.htm.
4. Stephen Soldz & Brad Olson, *Psychologists, Detainee Interrogations, and Torture: Varying Perspectives on Interrogation, in* THE TRAUMA OF PSYCHOLOGICAL TORTURE 70 (Aldjandro Ojeda ed., 2008).
5. See, *e.g.* GRETCHEN BORSCHELT, PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 126 (2005); INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON THE TREATMENT BY THE COALITION FORCES OF THE PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004); Alfred McCoy, *Legacy of a Dark Decade: CIA Mind Control, Classified Behavioral Research, and the Origins of Modern Medical Ethics, in* THE TRAUMA OF PSYCHOLOGICAL TORTURE 40 (Almerindo E. Ojeda ed., 2008) [hereinafter McCoy, *Legacy*]; MICHAEL OTTERMAN, AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND (2007); DOMINIC STREATFEILD, BRAINWASH: THE SECRET HISTORY OF MIND CONTROL (2007).
6. Press Release, Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues its Recommendations to the President (Aug. 24, 2009), http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html.
7. *See, e.g.* Press Release, Physicians for Human Rights, Rights Group Applauds Appointment of Prosecutor in CIA Torture Cases (Aug. 24, 2009), http://physiciansforhumanrights.org/library/news-2009-08-24.html; Close Torture Loopholes in the Army Field Manual, http://ccrjustice.org/get-involved/action/close-torture-loopholes-army-field-manual; *The Army Field Manual: Sanctioning Cruelty?*, AMNESTY INTERNATIONAL, March 19, 2009, http://www.amnesty.org.au/hrs/comments/20575/.
8 Jeffrey S. Kaye, *How the U.S. Army's Field Manual Codified Torture--and Still Does*, ALTERNET, Jan. 7, 2009, http://www.alternet.org/rights/117807/how_the_u.s._army%27s_field_manual_codified_torture_--_and_still_does.
9. SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH (John Peter Zubek ed. 1969).
10. Marvin Zuckerman, *Theoretical Formulations: I, in* SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9, at 407.

11. McCoy, *Legacy*, *supra* note 5.
12. JOHN D. MARKS, THE SEARCH FOR THE "MANCHURIAN CANDIDATE:" THE CIA AND MIND CONTROL: THE SECRET HISTORY OF THE BEHAVIORAL SCIENCES (1979).
13. McCoy, *Legacy*, *supra* note 5, at 45.
14. ALFRED MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR (2006).
15. The symposium at Harvard was funded under a secret contract from the Office of Naval Research, numbered Nonr 1866 [29]. *Id.* at 40.
16. SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL (Philip Solomon et al. eds., 1961).
17. SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9; *Id.*
18. THOMAS I. MYERS, DONALD B. MURPHY & SEWARD SMITH, GEORGE WASHINGTON UNIVERSITY HUMAN RES. RESEARCH OFFICE, PROGRESS REPORT ON STUDIES OF SENSORY DEPRIVATION (1961).
19. MARKS, *supra* note 12, at 151.
20. *Id.* at 65.
21. Louis Porter, *Evidence Suggests CIA Funded Experiments at State Hospital*, RUTLAND HERALD (Vermont), Nov. 30, 2008, *available at* www.rutlandherald.com/apps/pbcs.dll/article?AID=/20081130/NEWS/811300299.
22. M.P. Crawford, *Military Psychology and General Psychology*, 25 AM. PSYCHOLOGIST 328 (1970).
23. *Id.* at 330.
24. Letter from Leo Goldberger, Professor Emeritus, New York University, to author (May 12, 2007) (on file with author).

    25 CENTRAL INTELLIGENCE AGENCY, HUMAN RESOURCES EXPLOITATION TRAINING MANUAL (1983) [hereinafter HRETM], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/02-01.htm.
26. *Id.* at K. 1. The text of the HRETM manual is reproduced as originally written, and does not include handwritten or strike-out changes, which are visible in the declassified text. I have left out such later editing as not representative of the original intent of the authors of the manual. I have tried to stay as close as I could to the operational assumptions and definitions of the manual's original authors by sticking to the original text.
27. *Id.*
28. I.E. Farber et al., *Brainwashing, Conditioning, and DDD (Debility, Dependency, and Dread*, 20 SOCIOMETRY 271 (1957).
29. HRETM, *supra* note 25, at K.6, K. 7.
30. SOLOMON, *supra* note 16.
31. *Id.*
32. SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9.
33. JACK A. VERNON, INSIDE THE BLACK ROOM: STUDIES OF SENSORY DEPRIVATION (1963).
34. *Id.* at 179, 191.
35. THE MANIPULATION OF HUMAN BEHAVIOR (Albert Biderman & Herbert Zimmerman eds., 1961); S.I. Cohen et al., *Problems in Isolation Studies, in* SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16, at 114.
36. SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16, at 17.
37. Jack A. Vernon et al., *Factors Used to Increase the Susceptibility of Individuals to Forceful Indoctrination: Observations and Experiments*, 3 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY (1956); SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9.

38. SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9; SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16; Donald O. Hebb, *The Motivating Effects of Exteroceptive Stimulation*, 13 AMERICAN PSYCHOLOGIST 109 (1958) [hereinafter *Motivating Effects*].
39. Peter Suedfeld, *Theoretical Formulations: II, in* SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9, at 433.
40. LEO GOLDBERGER & ROBERT R. HOLT, NEW YORK RESEARCH CENTER FOR MENTAL HEALTH, A COMPARISON OF ISOLATION EFFECTS AND THEIR PERSONALITY CORRELATES IN TWO DIVERGENT SAMPLES (1961); SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16.
41. L.M. Brooks, *The Relation of Spatiral Isolation to Psychosis*, 27 J. OF ABNORMAL AND SOC. PSYCHOL. 375 (1933).
42. *Id.* at 378-79.
43. A. Petrie et al., *Pain Sensitivity, Sensory Deprivation and Susceptibility to Satiation*, 128 SCI. 1431 (1958).
44. KUBARK, *supra* note 3.
45. SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH, *supra* note 9.
46. *Id.* at 165.
47. SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16.
48. Vernon, *supra* note 37.
49. G.E. Ruff et al., *Factors Influencing Reactions to Reduced Sensory Input, in* SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16, at 72.
50. *Id.* at 76.
51 *Id.* at 80.
52. VERNON, *supra* note 33.
53. *Id.* at 85.
54. Ruff, *supra* note 49.
55. *Id.* at 90.
56. Lawrence Hinkle, Jr., *The Physiological State of the Interrogation Subject as it Affects Brain Function, in* THE MANIPULATION OF HUMAN BEHAVIOR, *supra* note 35, at 19, 26.
57. *Id.* at 27.
58. *Id.* at 28.
59. *Id.*
60. *Id.* at 29.
61. *But see* Donald Lindsley, *Common Factors in Sensory Deprivation, Sensory Distortion, and Sensory Overload, in* SENSORY DEPRIVATION: A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL, *supra* note 16, at 174.
62. Z.J. Lipowski, *Sensory and Information Inputs Overload: Behavioral Effects,* 16 COMPREHENSIVE PSYCHIATRY 199 (1975).
63. *Id.*
64. *Id.* at 210.
65. D.E. Bates, The Effect of Sensory Overload on Behavioral and Biochemical Measures 1-73 (1975) (Ph.D. dissertation, University of California Irvine).
66. *Id.*
67. Lipowski, *supra* note 62.
68. R. Plutchik, *The Effects of High Intensity Intermittent Sound on Performance, Feeling, and Physiology*, 56 PSYCHOL. BULL. 133 (1959).

69. SCOTT ALLEN ET AL., PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007).
70. *Id.* at 25.
71. STREATFEILD, *supra* note 5.
72. OTTERMAN, *supra* note 5.
73. VERNON, *supra* note 33.
74. L.S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES (1978).
75. Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Acting Legal Counsel, Cent. Intelligence Agency (July 20, 2007), *available at* http://www.aclu.org/torturefoia/released/082409/olc/2007%20OLC%20opinion%20on%20Interrogation%20Techniques.pdf.
76. C.A. Morgan & G. Hazlett, *Assessment of Humans Experiencing Uncontrollable Stress: The SERE Course*, 13 SPECIAL WARFARE 6 (2000).
77. Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Acting Legal Counsel, Cent. Intelligence Agency (May 10, 2005), *available at* http://www.globalsecurity.org/intell/library/policy/national/olc_050510_bradbury_20pg.htm.
78. AIDING TORTURE, *supra* note 1.
79. *Id.*
80. Memorandum from Navy SERE School Training Specialist and SERE Coordinator to Officer in Charge, After Action Report: Joint Task Force Guantanamo Bay Training Evolution (Jan. 15, 2003) [hereinafter Navy Memorandum], *available at* http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf. This was not declassified until 2009.
81. *The Origins of Aggressive Interrogation Techniques Before the S. Armed Serv. Comm.*, 110th Cong. (statement of Sen. Carl Levin).
82. Navy Memorandum, *supra* note 80.
83. Memorandum from Ted K. Moss, Lieutenant Colonel, United States Air Force to Joint Task Force Guantanamo Bay, JTF GTMO "SERE" Interrogation Standard Operating Procedure (Dec. 10, 2002), *available at* http://www.torturingdemocracy.org/documents/20021210.pdf.
84. Dep't of Defense, Camp Delta Standard Operating Procedures (March 23, 2003), *available at* http://88.80.16.63/leak/gitmo-sop.pdf.
85. *Id.*
86. HRETM, *supra* note 25.
87. Navy Memorandum, *supra* note 80.
88. *Id.*
89. *Id.*
90. U.S. ARMY FIELD MANUAL FOR HUMAN INTELLIGENCE COLLECTOR OPERATIONS (FM-2-22-3) (2006), *available at* http://www.fas.org/irp/doddir/army/fm2-22-3.pdf.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. ALLEN, *supra* note 69, at 44.

M. KATHERINE B. DARMER

RELIABILITY, WATERBOARDED CONFESSIONS AND RECLAIMING THE LESSONS OF *BROWN V. MISSISSIPPI* IN THE TERRORISM CASES

Introduction

The recent announcement that Khalid Shaikh Mohammed ("KSM") and other accused terrorists will be tried in a civilian courtroom[1] is certain to revive the debate about the use of "waterboarding" to obtain confessions from him.[2] KSM was subjected to waterboarding 183 times.[3] While some will contend that waterboarding is not torture,[4] I have explained elsewhere why I agree with those who have forcefully argued that waterboarding does constitute torture.[5] With that premise on the table, this essay seeks to draw on lessons from our past jurisprudence to illustrate that the results of waterboarded confessions cannot be used in any criminal trial nor should they be used in any other proceeding that has as its purpose ascertaining whether a personhas engaged in terrorism or any other criminal act. It also argues, however, that while "waterboarded" confessions should present relatively easy cases for exclusion (especially in conventional criminal trials), current jurisprudence leaves problematic "protection gaps" that could arguably permit the introduction of torture-based confessions in trials and other contexts.

This essay traces the most problematic "protection gap" to a shift away from a concern with reliability in the Supreme Court's post-*Miranda* confessions jurisprudence, most clearly expressed in *Colorado v. Connelly*[6] where the Court maintained that a confession's potential unreliability did not make its admission unconstitutional. While that case involved the confession of a person suffering from psychotic delusions, this essay argues that *Connelly* has significant implications for the terrorism and national security cases.[7] In order to avoid results that are plainly inconsistent with the Supreme Court's repudiation of the use of a torture-based confession almost 75 years ago in the important case of *Brown v. Mississippi*,[8] notions of due process need to be interpreted more broadly, consistent with *Brown*'s recognition of an absolute prohibition on torture in our adversarial system.

The Supreme Court spoke powerfully, clearly and unanimously in rejecting torture in 1936. The insight of *Brown* is that it is unthinkable for a system such as ours to rely on torture in adducing guilt. Even ten years ago, torture was not part of our national debate. That has changed since 9/11. Indeed, no longer is torture unthinkable. We know it has occurred.[9] The Abu Ghraib scandal revealed that American soldiers had badly mistreated detainees. American agents have

---

M. Katherine B. Darmer is a professor at the Chapman University School of Law.

repeatedly waterboarded suspects. Some suspects have died in custody. We must reclaim a history that categorically rejects torture.

Torture is sometimes debated in deontological terms, and sometimes on utilitarian grounds. In the former context, arguments are made about the *wrongness* of torture, even if it "sometimes works." The latter debate instead asks *whether torture works* (by yielding reliable evidence) and *whether using torture is worth it*. The history of our jurisprudence reveals that from the standpoint of the *law*, at least, the question of *whether torture yields reliable evidence* has been settled. In *Brown v. Mississippi* the Court denounced torture, declaring that confessions wrought through brutality are unreliable. That proposition should remain settled. The Court in *Brown* also displayed a keen concern for judicial integrity, hinging its finding of a due process violation on the *use* of the confession at trial. Reliability of proceedings was an animating concern of the *Brown* Court.

Historically, the Court has emphasized that, regarding confessions, reliability is necessary, but not sufficient, in order for a confession to be admissible into evidence. Because tortured confessions have been considered, under the law, to be unreliable, they are per se excluded. Reliance on such evidence undermines the integrity of any system that purports to be fairly adjudicating guilt or innocence, and institutional integrity was of central importance to the Brown Court. My focus is not whether torture may have extracted reliable information in a particular case (e.g., the case of KSM), but instead I focus on torture as a practice that has been properly rejected as a matter of institutional integrity.

Following this introduction, I will turn to the Court's pre-*Miranda* confessions jurisprudence, which developed under the Due Process Clause. *Miranda v. Arizona*[10] marked a turning point in this area of the law. While intended to be a progressive decision that would further protect defendants' rights, the decision had the unfortunate effect, during the development of a grudging post-*Miranda* jurisprudence,[11] of de-emphasizing reliability. This jurisprudential shift has unfortunate implications in the post-9/11 era. Thus, I will discuss the *Miranda* case and the post-*Miranda* cases in order to illuminate fissures that have left suspects vulnerable to a return to the days when guilt could be determined on the strength of torture-based confessions. While the terrorism cases present a myriad of difficult issues, I aim to demonstrate that reliability is absolutely necessary, though not sufficient, and that the lessons of *Brown* have important implications for a robust understanding of the demands of due process. As all three branches of government struggle with how to deal with the terrorism cases, we would be wise to learn the lessons of our own history.

I. Reliability during the development of confessions law under the due process regime[12]

Prior to its landmark decision in *Miranda v. Arizona*, the Supreme Court developed a confessions jurisprudence under the Due Process Clause of the Fourteenth Amendment,[13] which provides that no State may "deprive any person of life, liberty, or property, without due process of law."[14] (The parallel provision of the

Fifth Amendment constrains the federal government.) In determining whether a confession violated the Due Process Clause, the Court focused historically on the question of "voluntariness."

As the Court explained almost fifty years ago, "a complex of values" underlay the Court's prohibition on the use of confessions deemed "involuntary."[15] One key consideration under the voluntariness test was preventing the introduction into evidence of false, or unreliable, confessions,[16] including those obtained through physical coercion.

A. *Brown v. Mississippi* and the condemnation of torture

In *Brown v. Mississippi*,[17] the Court unequivocally condemned a state court's reliance on torture-based confessions as being inconsistent with the Due Process Clause, overturning a conviction obtained though the use of confessions elicited through brute force.[18] Officials, accompanied by an angry mob, extracted a confession from one suspect after hanging him from a limb of a tree with a rope, tying him to the tree, whipping him, then whipping him again on a separate occasion.[19] Two other suspects were whipped with a leather strap and buckle.[20] The facts relating to the defendants' torture and abuse were undisputed.[21] With regard to the first defendant:

> They hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.[22]

Accounts of "waterboarding" are also horrifying. As a United States aviator subjected to the practice by Japanese captors described it:

> I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I'd get my breath, then they'd start over again.[23]

As described by a journalist who voluntarily underwent the experience during recent debates about the practice:

> Inhalation brought the damp cloths tight against my nostrils, as if a huge wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of

> being pulled upright . . . . [Following a second episode], I was an abject prisoner of my gag reflex. The interrogators would hardly have had time to ask me any questions and I would quite readily have agreed to supply any answer.[24]

In a unanimous decision 73 years ago in *Brown*, the Court found a "clear denial of due process" where torture was relied upon,[25] noting further that its decision did not depend upon the application of the self-incrimination clause (which did not yet apply to the states).[26] The court explained that the self-incrimination clause is directed to "the process . . . by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."[27] It is significant that the Court recognized a due process right to procedures involving confessions, wholly apart from the right against self-incrimination.

While noting that the individual states had expansive freedom to regulate their own court procedures, the Court explained that there are limits to those freedoms. The states' processes cannot offend fundamental principles of justice: "the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand."[28]

The Court described a trial as "mere pretense" when state authorities "have contrived a conviction resting solely upon confessions obtained by violence."[29] Applying those principles to the case before it, the Court found that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners"; the use of such confessions at trial "was a clear denial of due process."[30] The Supreme Court found it significant the trial court both knew of how the confessions had been obtained and that there was no other evidence upon which to base a conviction. The ensuing conviction and sentence were thus "void for the want of the essential elements of due process."[31]

Reliability was a central concern of the *Brown* Court. As Laurie Magid has noted, "[i]n *Brown* and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable."[32]

In an important article exploring the difference between the illegal procurement of evidence and the illegal use of evidence, Arnold Loewy notes that *Brown* involved a case in which the confession was unconstitutionally obtained. In his words, "[f]or an extreme example, consider *Brown v. Mississippi*, in which the defendants were severely beaten and were threatened with continuous beatings unless they confessed. Such police conduct is clearly wrong in itself, regardless of whether any confession is used or even obtained. Consequently, defendants like Brown, but unlike Miranda, can sue the police officers for violating their constitutional rights."[33] While Loewy is almost certainly correct that officers engaged in the conduct at issue in *Brown* would currently be subject to suit, that issue was not before the *Brown* Court. Moreover, while the *Brown* Court

condemned the actions of the law enforcement officers, its holding also spoke to the wrongful use of the tortured confessions and the complicity of the trial court in knowingly permitting their introduction. *Brown* is not just a case about the wrongful extraction of a confession, but a case about the violence done to due process by the later use of those confessions.[34] This fact has implications for current debates about bringing suspected terrorists to justice.

B. Reliability in the post-*Brown* era

In terms of the Court's due process confessions jurisprudence, the role of reliability in post-*Brown* cases was less plain. Rather, "[e]ven though reliability was clearly uppermost in the Court's mind when it decided *Brown v. Mississippi*, the Court gave mixed and confusing signals in subsequent cases about the precise rationale for the voluntariness requirement."[35] In *Lisenba v. California*, for example, the Court noted that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[36] In *Lisenba* the Court affirmed the conviction, finding that the conduct of law enforcement in obtaining a confession was not "grave" enough to warrant reversal.

In most of the post-*Brown* cases, however, reliability was implicitly considered to be of fundamental importance. Moving beyond *Brown*, the Court made clear that some police methods falling short of the rank brutality of *Brown* were also inconsistent with due process. *Brown* was a floor but not a ceiling. In the same way, even if not explicitly stated, reliability was generally a floor but not a ceiling: a confession could be deemed "involuntary" and thus inadmissible even if there was no real concern with reliability.

In *Spano v. New York*,[37] for example, the Court analyzed psychological pressures used on a suspect, suggesting that the methods were abhorrent beyond any concern that the methods might yield unreliable confessions. It found a due process violation when police ignored the defendant's refusals to talk in a series of interrogation sessions spanning almost eight hours.[38]

In focusing on the "police methods" used,[39] Chief Justice Warren explained that society's "abhorrence" of the use of "involuntary confessions" is based not just on their "inherent untrustworthiness" but also on the "deep-rooted feeling that the police must obey the law while enforcing the law."[40] He acknowledged that in the days since *Brown v. Mississippi*[41] the Court had not been confronted with such a case of brute force, nor had any subsequent case approached "the 36 consecutive hours of questioning" at issue in an earlier case.[42] In that case, Spano's will was "overborne by official pressure, fatigue and sympathy falsely aroused."[43] In emphasizing Spano's "overborne will," Chief Justice Warren's uppermost concern did not appear to be "reliability" *per se*. Rather, he seemed chiefly concerned that the state had interfered with the defendant's freedom to choose whether to confess, not a concern that it extracted a factually false confession from him.[44]

Indeed, in *Rogers v. Richmond*,[45] the Court went even further, expressly rejecting the notion that reliability *per se* was at the heart of the voluntariness inquiry. The Supreme Court chided the trial court for admitting a confession based on its reliability without focusing on whether law enforcement acted "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."[46]

Rogers thus illustrates that reliability, while implicitly necessary, was not sufficient to warrant introduction. Put another way, a finding that a confession was *unreliable* was sufficient but not necessary to exclusion under the Court's developing due process jurisprudence. Rather, if officers acted so as to overbear a suspect's will even through methods that were unlike the torture at issue in *Brown*, the confession could still be deemed "involuntary."

In writing about the history of confessions law, Steven Penney identifies three themes that dominate the Court's opinions: concerns with the unreliability of confessions extracted under questionable circumstances,[47] a desire to deter abusive police practices,[48] and a concern with protecting the autonomy of the individual suspect.[49]

While reliability during this period may not have been the Court's only concern, it was an important concern. Indeed, where the Court criticized the trial court in *Rogers* for relying on reliability, it was to make clear that reliability was not sufficient—even though implicitly reliability was necessary. However, with the Court now confronted more often with psychological ploys rather than the abject brutality of *Brown*, the unanimity of *Brown* was replaced by "bitter divisions" as the Court struggled to answer the question of how much pressure on a subject is "too much."[50] Importantly, however, the Court never abandoned its condemnation of torture.

II. The problematic shift away from the essential importance of reliability

A. The Self-Incrimination Clause and due process

With its decision in *Miranda v. Arizona*, the Court made the Fifth Amendment Self-Incrimination Clause the centerpiece of its analysis of future confessions, at least of those in routine interrogation cases. In *Miranda*, of course, the Court held that "custodial interrogation" is inherently coercive and that any confession taken in police custody will be presumed coerced unless the now-famous *Miranda* warnings are given.[51] Because the Fifth Amendment explicitly provides that no one shall be required in "any criminal trial" to be a witness against him/herself, the protections of the Fifth Amendment are triggered, in the custodial interrogation context, only when there is a criminal trial. It does not apply in other contexts and does not act as a "check" on abusive police conduct itself, as illustrated in the recent case *Chavez v. Martinez*.[52]

In *Chavez*, the Court held that the Fifth Amendment did not apply in circumstances where a suspect shot by the police was later questioned relentlessly in a

hospital. Because the statements were never used against Martinez at a criminal trial, his claims under the Fifth Amendment were unavailing. The Supreme Court left open the possibility, however, that police had violated Martinez's due process rights, and the Ninth Circuit ultimately held that the facts indeed suggested a due process violation:

> The Fourteenth Amendment's Due Process Clause protects individuals from state action that either "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." Martinez alleges that Chavez brutally and incessantly questioned him, after he had been shot in the face, and back and leg and would go on to suffer blindness and partial paralysis, and interfered with his medical treatment while he was "screaming in pain . . . and going in and out of consciousness." . . . A clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation. . . . [U]nder the facts alleged by Martinez, Chavez violated Martinez's clearly established due process rights.[53]

The difference between the *use* of a confession at trial in derogation of the Fifth Amendment and the wrongful extraction of a confession that might violate the Due Process Clause but not the Self-Incrimination Clause is illustrated in Justice Marshall's dissenting opinion in *New York v. Quarles*.[54] In that case, police asked a suspect about the location of a gun, without first providing *Miranda* warnings. The Court, in a majority opinion written by Justice Rehnquist, found that *Miranda*'s "doctrinal underpinnings" did not require that it "be applied in all its rigor" to questions reasonably motivated by public safety concerns. The Court created a "public safety" exception to *Miranda*.[55]

Justice Marshall forcefully argued that the creation of such an "exception" was inconsistent with the underlying rationale of *Miranda*, which held that custodial interrogation is inherently coercive (and is no less coercive when "emergency questioning" might be justified). If there is a threat to the public safety, Marshall agreed, the police should by all means question a suspect, but the results of the questioning cannot be introduced at trial. Questioning is *itself* not constitutionally infirm; rather, it is the *use* of the presumptively coerced confession at trial that implicates the Fifth Amendment. The Due Process Clause sets limits on police conduct, but the Fifth Amendment's Self-Incrimination Clause, standing alone, does not. In Marshall's words:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.[56]

Marshall's understanding of the limits of Fifth Amendment protections was precisely at issue in *Chavez*. Regardless of the brutality that may be employed, the Fifth Amendment Self-Incrimination Clause does not "kick in" unless and until such tortured confessions are used at trial. Rather, due process is the only real limit on law enforcement tactics themselves.

The intersection of the Self-Incrimination and the Due Process Clauses yields problematic "protection gaps" not only regarding possible mistreatment, but even regarding conviction or imprisonment. Specifically, suspects are vulnerable to being subject to convictions or other deprivations of liberty based upon unreliable confessions, including even those extracted by the type of torture that was unanimously condemned by the Court almost 75 years ago in *Brown*. That is because the Court's later jurisprudence has de-emphasized reliability.

By its terms, the Fifth Amendment Self-Incrimination Clause should prevent the introduction of any "truly compelled statements" at trial, whether or not those statements are extracted by United States law enforcement officers or by foreign agents in the terrorism context.[57] Under an appropriately robust interpretation of the Fifth Amendment's prohibition of compelled self-incrimination, waterboarded statements would be forbidden in a trial. Other interpretations of the Fifth Amendment's proscription of self-incrimination, however, suggest that that particular constitutional protection is not directed at forbidding the results of brutality. As the *Brown* Court itself stated when deciding that case on due process grounds: the self-incrimination clause is directed to "the process . . . by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."[58]

By the time *Miranda* was decided, the Court was more concerned with psychological than physical intimidation and was struggling to simplify its confessions jurisprudence, which had become tangled and unclear during the development of the due process voluntariness test, post-*Brown*. Few cases since *Brown* have dealt with instances of police brutality, and where confessions are rejected on that basis, the Court has continued to rely on the Due Process Clause, which serves as a "'backup' test that is increasingly difficult to meet."[59]

B. The Court's ennervated due process jurisprudence after *Colorado v. Connelly*

At first blush, it might not appear that *Colorado v. Connelly*[60] is problematic from the perspective of ensuring that there are limits on what can be done to terrorism suspects. The police in that case were responsible for no harsh treatment of a suspect whatsoever. Rather, a suspect literally approached a police officer on the street and said that he wanted to discuss a murder he had committed. The officer gave the defendant *Miranda* warnings, but the suspect persisted in his stated desire to confess, provided information about a murder, and took the police to the alleged location of the murder.[61] The Court focused on the lack of any misconduct by officers and the underlying "deterrence" rationale of excluding evidence.

In the course of deciding the case, however, the Court denigrated reliability concerns, narrowing the focus of the earlier *Brown* Court's concern about reliable process. This severing of "reliability" from the considerations of due process is deeply problematic from the perspective of ensuring that trials and trial-like proceedings are not tainted by the use of unreliable evidence.

At a pretrial hearing in *Connelly*, a state psychiatrist testified that Connelly was "suffering from chronic schizophrenia," had experienced "command hallucinations," and that his confession was motivated by psychosis.[62] The Colorado trial court suppressed the statements as "involuntary" and the Colorado Supreme Court affirmed, finding that the introduction of the statements alone was sufficient "state action" to implicate the Due Process Clause of the Fourteenth Amendment.[63]

The Supreme Court, in a majority opinion written by Chief Justice Rehnquist, disagreed with the state courts, finding that a due process violation depends upon a finding of "coercive police activity,"[64] which was not present in *Connelly* because the defendant had walked up to an officer on the street to confess. The Court emphasized that "coercive police misconduct" was the "catalyst" for the Court's decision in *Brown v. Mississippi*,[65] where the brutal police conduct contrasted sharply with the benign conduct of officers in *Connelly*.

Implicitly criticizing the Colordado Supreme Court for finding that "the very admission of the evidence in a court of law was sufficient state action to implicate the Due Process Clause," Chief Justice Rehnquist noted that the Court's cases since *Brown* "have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[66]

Focusing on the deterrence rationale of the exclusionary rule and the lack of any wrongful conduct on the part of police, the Court declined to "require sweeping inquires into the criminal mind of a criminal defendant who has confessed."[67] Conceding that a confession such as Connelly's might prove "quite unreliable," it determined that such issues were matters for the laws of evidence and did not implicate the Constitution.[68] Reducing the purpose of the exclusionary rule simply to deterrence, the Court asserted that "[t]he purpose of the excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."[69] Because there was no misconduct of law enforcement to deter in this case, the Court essentially found that to be the end of the inquiry.

In his dissenting opinion, Justice Brennan emphasized that the voluntariness inquiry regarding confessions has historically been concerned not just with police misconduct but also with a suspect's free will and reliability.[70]

In that opinion, Brennan tacitly addressed the issue that, prior to *Connelly*, a finding of reliability was necessary but not sufficient in order for a confession to be admitted:

> The instant case starkly highlights the danger of admitting a confession by a person with a severe mental illness. The trial court made no findings concerning the reliability of Mr. Connelly's involuntary confession, since it believed that the confession was excludable on the basis of involuntariness. However, the

> overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. . . .
>
> Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. . . . To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.[71]

As I have argued elsewhere, the majority's almost exclusive focus on deterrable police misconduct leaves suspects vulnerable to having confessions introduced against them if those confessions were extracted by, for example, foreign agents over whom the United States has no control. But, importantly, the seminal decision in *Brown* did not simply turn on the fact that the sheriffs and his deputies abominably abused the defendants. Rather, the Court focused on the *use* of the confession at a trial, finding that it was the use of the confession itself that violated due process. Chief Justice Rehnquist's quote of just a phrase of *Brown*, *i.e.*, that the police action at issue was "revolting to the sense of justice," overlooks that the *Brown* Court went on to say that it was the confession's "use" that violated due process.[72]

To be sure, the conduct of the police officers in *Connelly* appears to be above reproach and dramatically different than the abusive conduct of the *Brown* law enforcement officers. But it is an overly narrow reading of *Brown* to suggest that that was just a case about "misconduct" by law enforcement officers. It was also a case about trial integrity and the expectation that trial judges should serve as gatekeepers to prevent the introduction of patently unreliable evidence obtained through torture. Indeed, the eminent confessions law scholar Yale Kamisar has opined that the outcome in *Brown* would have been the same if the confessions in that case had been obtained by "torturous acts of the Ku Klux Klan" rather than through official brutality.[73] A close reading of *Brown* reveals that the Court seemed particularly concerned that a judge would participate in a "pretense of a trial" that relied upon such evidence. As Mark Godsey has pointed out regarding *Connelly*, "[i]n holding that there was no 'state action' in the case, because the officer did nothing to induce Connelly's confession, the Court ignored the admission into evidence of the confession as a possible basis for state action. The admission into evidence of a false confession had the been the predicate 'state action' in *Brown v. Mississippi*."[74]

The *Connelly* Court's cramped view of the State's responsibilities with respect to the use of unreliable confessions is particularly problematic in light of later jurisprudence taking a more expansive view of "state action." In *Edmonson v. Leesville Concrete Co.*,[75] for example, the Court held that a private litigant's exercise of racially discriminatory peremptory strikes against jurors amounted to state action because it arose in the context of a trial in which even private litigants act pursuant to state rules and procedures. If a private litigant's acts can implicate the Fourteenth Amendment, surely the introduction into trial of an unreliable confession should as well.

Of course, the author of *Connelly*, Chief Justice Rehnquist, joined O'Connor's dissenting opinion in *Edmonson*, which argued that "[n]ot everything that happens in a courtroom is state action."[76]

The *Connelly* case has been much criticized,[77] and most of the focus is on the case's implication for mentally incompetent defendants. I believe there are troubling implications in the terrorism context, as well, and that the case results in "protection gaps" for terrorism suspects.

III. Implications of Historic Jurisprudence in the Terrorist Cases

A. Confessions Obtained by U.S. Agents

1. Conventional Criminal Trials

The announcement that KSM and others would be tried in conventional criminal trials was controversial, in part, because of the "expansive protections" that are normally accorded to defendants in conventional criminal courts. Under either a Fifth Amendment Self-Incrimination Clause or due process analysis, "waterboarded" confessions should provide easy cases for exclusion. In a conventional criminal court, terrorism suspects may even be able to claim *Miranda* rights. I have argued elsewhere that *Miranda* both over-protects and under-protects in the terrorism context, and have argued that terrorism suspects should not have the benefit of *Miranda* warnings.[78] Even leaving aside the Court's *Miranda* jurisprudence, however, a confession obtained by waterboarding at the hands of United States agents fails the due process inquiry. Since *Brown* it has been well established that confessions obtained through torture should be categorically forbidden.

Upon a closer look, however, the case for excluding a waterboarded confession may not be as straightforward as it should be. When one looks at *Connelly*'s focus on the need for deterrence, the question of exclusion of such confessions gets tangled up in the question of whether agents who administered waterboarding acted illegally. This question, in turn, is complicated by the fact that former Administration lawyers wrote lengthy memoranda seeking to justify tactics such as waterboarding for particular detainees.[79] Most notoriously, the Bybee-Yoo Torture and Power Memorandum ("BYTAP") opined that an interrogation method would not constitute "torture" unless the pain inflicted was tantamount to the pain consistent with "a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions."[80] While I believe that waterboarding constitutes torture even under this narrow BYTAP definition,[81] that proposition remains unsettled, and agents acting under the authority of BYTAP would argue that they believed in good faith that waterboarding was permitted. Indeed, later Administration legal memoranda specifically permitted waterboarding, including that used against KSM.[82] If agents used waterboarding in "good faith" reliance upon legal memoranda, was there "misconduct" to "deter" under the rationale of *Connelly*? *Connelly*'s narrow focus on the lack of "wrongdoing" by law enforcement in that case and its complete deconstitutionalization of issues of reliability, standing alone, suggest that it is not inconceivable that

arguments could be made to support the use of waterboarded confessions even in conventional criminal trials.

To be sure, the current Attorney General is on record that "waterboarding" constitutes torture, but we have seen this Administration retreat from other civil liberties positions relevant to the War on Terror since the election. Moreover, fundamental human rights protections should not be subject to the vagaries of who inhabits the White House. The strong message of *Brown*—that a trial lacks integrity if it relies in any way upon torture—is an enduring lesson that risks being undermined by *Connelly*.

2. Proceedings Outside of the Conventional Court System

Some detainees will be tried before military commissions, rather than in conventional criminal courts.[83] Proceedings before military commissions provide fewer formal rights than do trials. The Military Commissions Act of 2006 ("MCA") provides "vastly more limited protections than do either ordinary criminal trials or traditional military courts martial."[84] While purporting to ban "torture," again, United States agents could plausibly argue that they understood waterboarding *not to constitute torture*. The MCA includes a "good-faith defense" that applies retroactively to cover the period between September 11, 2001 and the passage of the Detainee Treatment Act of 2005 ("DTA").[85] Moreover, statements can be introduced in military commission proceedings when the amount of "coercion" used is subject to dispute.[86]

Even more troubling is the fact that detainees can be held indefinitely as "enemy combatants" based merely on flawed Combatant Status Review Tribunals ("CSRTs"). CSRTs specifically permit holding detainees based upon information obtained through torture.[87] While the DTA (also known as the McCain Amendment)[88] purported to deal with the torture problem, its anti-torture provision applies only to future CSRTs, not to those held before the passage of the Act.[89] The DTA bans interrogation techniques that are not authorized by the Army Field Manual (which prohibits waterboarding) but it does not ban other disputed techniques, such as "forced standing."[90] Linda Keller has recently pointed out other gaps in the protections provided by the DTA.[91]

The fact that the DTA does not apply retroactively, and provides for a "good faith defense" for those who may have waterboarded before its passage, means that detainees could be held based upon the results of brutality. Yet the lesson of *Brown* is that we can have no confidence, as an institutional matter, if decisions regarding guilt or indefinite detention are based upon tortured confessions.

B. Confessions Obtained by Foreign Agents

Connelly has even more dire implications for the use of confessions obtained by foreign agents against whom the United States exercises no control. *Connelly*'s focus on deterrence and deconstitutionalization of reliability means that a tortured confession obtained abroad by foreign agents could be introduced into an American court consistent with *Connelly*'s interpretation of due process. Notably, I am

not referring here to the practice of "extraordinary rendition," which presents a wholly different problem. In cases where the United States deliberately renders a suspect abroad on the understanding that he will be tortured, there is "deterrable" misconduct if United States officials participated in the rendering, and arguably such conduct could run afoul even of *Connelly*'s narrow view of due process (although questions of "good faith" outlined above would still apply). Where confessions are obtained with no involvement by U.S. agents, however, *Connelly* would suggest that confessions could be used despite unreliability. This is deeply problematic.

Conclusion

The lesson of *Brown* is that courts should act as gatekeepers to forbid the use of tortured confessions in court. Even beyond conventional criminal courts, any system designed to adjudicate guilt or innocence with integrity cannot rely on tortured confessions. Our own Supreme Court recognized that due process is offended by torture almost 75 years ago. The due process violation it identified was not just the torture inflicted by law enforcement, but the systematic offense to due process wrought by the reliance on torture at the "pretense" of a trial.

After 2001, we are in danger of failing the lessons of *Brown*. A more robust interpretation of due process, with a focus on both reliability of confessions and the integrity of judicial and quasi-judicial proceedings, is truer to our history and values[92] than the notion that exclusion serves no goal other than deterrence and that reliability serves no part of the Constitution.

NOTES

1. Charles Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court In New York*, N.Y. TIMES A1 (Nov. 14, 2009). Since this announcement was made, there has been particular resistance to holding the trial in New York City.
2. *See* Mark Mazzetti, *Portrait of 9/11 'Jackal' Emerges As He Awaits Stage in New York*, N.Y. TIMES A1, A22 (Nov. 15, 2009).
3. *Id*. at A22.
4. *Cf*. *id*. (noting that Attorney General Eric H. Holder Jr. has described the "near-drowning" technique as "torture" but that advocates have said that C.I.A. methods "produced a trove of information").
5. *See* M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections From a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639, 648-51 (2009) (describing waterboarding technique and characterizing waterboarding as torture).
6. 479 U.S. 157 (2003). I note that the term "protection gap" has been used frequently by others in a varity of contexts.
7. *See also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 354-372 (2003) (suggesting implications of post-*Miranda* due process jurisprudence in terrorist cases); Mark Godsey, *The New Frontier of Constitutional Confession Law – The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L. J. 851, 889-895 (2003) (discussing implications of *Connelly*).
8. 297 U.S. 278 (1936).

9. *See* Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 CHAP. L. REV. 615, 623-625 (2009).
10. 384 U.S. 436 (1966).
11. For more details on the Court's post-*Miranda* jurisprudence, see MK.B. Darmer, *Lessons from the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 Brook. L. Rev. 241, 264-68 (2002) and Darmer, *supra* note 7, at 342-45.
12. Portions of this section are adapted from Darmer, *supra* note 7, at 329-30, 334-37.
13. In one significant nineteenth century decision, *Bram v. United States*, 168 U.S. 532 (1987), the Court addressed the admission of a confession under the Fifth Amendment. For a further discussion of *Bram*, see Darmer, *supra* note 7, at 325-327. Following *Bram*, however, "the Court began to ignore the privilege against self-incrimination as a basis for finding confessions inadmissible and focused instead on the Due Process Clauses of the Fifth and Fourteenth Amendments." Mark A. Godsey, Miranda's *Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L. J. 1703, 1715 (2002).
14. U.S. Const. amend. XIV; s*ee* Dickerson v. United States, 530 U.S. 428, 433 (2000) (explaining that "notions of due process" prohibited coerced confessions before *Miranda*); Michigan v. Tucker, 417 U.S. 433, 441 (1974) ("In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary."); Spano v. New York, 360 U.S. 315, 315 (1959) (describing case as "another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."); *see also* Catherine Hancock, *Due Process Before* Miranda*,* 70 TUL. L. REV. 2195, 2196 (1996) (stating that due process had a "constitutional reign of thirty years").
15. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).
16. *See* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009–14 (1998). Another value was ensuring that police methods in law enforcement were appropriate. *See id*. at 2013.
17. 297 U.S. 278. For a fuller discussion of the case, see Morgan Cloud, *Torture and Truth*, 74 Tex. L. R. 1211 (1996).
18. *See* Hancock, *supra* note 14, at 2203 (describing police conduct in the case as torture).
19. *Brown*, 297 U.S. at 281–82.
20. *Id.* at 282.
21. *Id.* at 281; *see also id.* at 284–85 (noting that three witnesses who participated in whippings, including the deputy, were introduced, and "not a single witness was introduced who denied it").
22. 297 U.S. at 281-82 (quoting dissenting opinion from state court decision, 161 So. 465, 470-71).
23. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts,* 45 COLUM. J. TRANSNATL'L LAW 468, 476 (quoting Excerpts from testimony of Cpt. Chase Jay Nielsen, Trial Record at 55, United States v. Sawada, 5 L. Rep. Trials of War Criminals 1 (1948)); *see also* Darmer, *supra* note 5, at 648-49.
24. Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, August 2008; *see also* Darmer, *supra* note 5, at 649-50.
25. *Brown*, 297 U.S. at 286-87.
26. The Fifth Amendment was applied to the states almost 30 years later, in *Malloy v. Hogan*, 378 U.S. 1 (1964), and then extended to questions of custodial interrogation in *Miranda v. Arizona*, 384 U.S. 436 (1966).
27. *Brown*, 297 U.S. at 285.
28. *Id*. at 285-86.

29. *Id*. at 286.
30. *Id*. at 286.
31. *Id*. at 287.
32. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1173 (2001).
33. *Id*. at 933-34 (citations omitted).
34. *Cf*. Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).
35. Magid, *supra* note 32, at 1174. For a discussion of later cases analyzing "voluntariness," see Darmer, *supra* note 7, at 330-34.
36. 314 U.S. 219, 236 (1941).
37. 360 U.S. 315 (1959).
38. *Id.* at 315. The defendant's repeated requests to consult with his attorney were denied. He finally confessed after a close childhood friend, who was then attending the police academy, falsely told Spano that Spano's situation had gotten the friend "in a lot of trouble" and that he was concerned for the financial welfare of himself, his pregnant wife, and his three children. *Id*. at 319. The "friend" prevailed upon Spano on three occasions without success. "Inevitably," however, "in the fourth such session . . . lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement." *Id*.
39. As Professor Yale Kamisar points out, *Spano* illustrates "[t]hat the Court was applying a 'police methods—as well as a 'trustworthiness' test.'" YALE KAMISAR, WAYNE R. LAFAVE, ET AL., MODERN CRIMINAL PROCEDURE 545 (12 ed. 2008).
40. *Spano*, 360 U.S. at 320.
41. 297 U.S. 278 (1936).
42. *Spano*, 360 U.S. at 321 (citing Ashcraft v. Tennessee, 322 U.S. 143 (1944). For a discussion of the *Ashcraft* decision, see Darmer, *supra* note 7, at 330-31. In *Spano*, Chief Justice Warren noted that the more "sophisticated" methods being used currently to "extract confessions" only make more difficult the Court's "duty to enforce federal constitutional protections" because of "the more delicate judgments to be made." 360 U.S. at 321.
43. *Id.* at 323.
44. *See, Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 973 (1966) (due process inquiry focusing on defendant's state of mind "assumes that the constitutionally protected interest of the accused is the right to decide, free from unfair pressure, whether he wants to confess"). The difficulty, of course, comes in determining when pressure is "unfair." *Cf. id.* (noting evolution of definition of "unfair pressure" in thirty years leading up to 1966).
45. 365 U.S. 534 (1961).
46. *Id.* at 544.
47. Steven Penney, *Theories of Confession Admissibility: A Historical* View, 25 AM. J. CRIM. L. 310 (1998). *But see* Colorado v. Connelly, 479 U.S. 157 (1986) (discussed *infra*) (suggesting that reliability of confessions is not a concern of due process).
48. Most commentators have focused on some version of Penney's first two concerns. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 65 (1993) ("In the view of most commentators, courts have had two real reasons for excluding confessions as involuntary: (1) a desire, surviving from the common-law approach, to eliminate untrustworthy confessions and (2) a desire to control offensive police practices.").
49. *See* Penney, *supra* note 47, at 313. Penney argues forcefully that the third concern, which he refers to as the "self-determination theory," is "morally suspect" because "the idea that criminal suspects should have an intrinsic, deontological right to silence fails to accord with widely-held views of political and personal morality." *Id.*
50. Darmer, *supra* note 11, at 255.

51. A suspect must be told that s/he has the right to remain silent, that anything s/he says can be used against him/her, that s/he has a right to an attorney and that if s/he cannot afford one, an attorney will be provided.
52. 538 U.S. 760 (2003).
53. Martinez v. City of Oxnard, 337 F.3d 1091 (9th Cir. 2003). Prior to the Supreme Court's holding in *Chavez*, 538 U.S. 760, the Ninth Circuit had held that Martinez also had a viable Fifth Amendment claim. For a further discussion, see Darmer, *Confessions Law in an Age of Terrorism*, *supra* note 7, at 349-51.
54. 467 U.S. 649 (1984).
55. *Id*. at 656.
56. *Id*. at 686 (Marshall, J., dissenting) (citations omitted).
57. *See* Darmer, *supra* note 5, at 645-47; Darmer, *supra* note 7, at 354.
58. 297 U.S. at 285; *see also* Larry Rosenthal, *Against Orthodox:* Miranda *is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 589 (2007) (noting that "the most natural reading of the term 'compulsion' is the threat of adverse consequences—such as the historically paradigmatic sanction of conviction or contempt—as a form of coercive pressure on a suspect to become a 'witness' against himself").
59. Darmer, *supra* note 7, at 357; *see also generally id*. at 357-360 (discussing use of due process test post-*Miranda*).
60. 479 U.S. 157 (1986).
61. *See id*. at 160-61. As pointed out in the dissent, the record was "barren" of any corroboration of Connelly's confession. *Id*. at 183 (Brennan, J., dissenting). "No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there." *Id*.
62. *Id*. at 161-62.
63. *Id*. at 162-63.
64. *Id*. at 522.
65. *Id*. at 163.
66. *Id*. at 163-64 (footnote omitted).
67. *Id*. at 165-67.
68. *See id*. at 167.
69. *Id*. at 167.
70. *See id*. at 176 (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's dissent.
71. *Id*. at 183 (Brennan, J., dissenting).
72. *See* notes 30-31, *supra* and accompanying text.
73. Lawrence Herman, *The Unexplained Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confessions Rule (Part II)*, 53 OHIO ST. L. J. 497 n.647 (1992) (recounting private conversation with Professor Kamisar).
74. Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 627 n.30 (2007).
75. 500 U.S. 614 (1991).
76. *Id*. at 632 (O'Connor, J., dissenting).
77. *See generally, e.g.,* Godsey, *supra* note 74.
78. *See* Darmer, *supra* note 7 (proposing "foreign interrogation" exception to *Miranda*;) Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 642 (2007) (arguing for broad application of "public safety" exception to *Miranda* in terrorism cases).

79. *See*Darmer, *supra* note 5.
80. BYTAP Memo in CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 305 (M. Katherine B. Darmer, Robert M. Baird & Stuart Rosenbaum, eds., 2004).
81. *See* Darmer, *supra* note 79, at 650; Wallach, *supra* note 23, at 506.
82. *See* Memorandum from Steven G. Bradbury for John A. Rizzo, Senior Deputy General Counsel, CIA, 37 (May 30, 2005).
83. *See* Savage, *supra* note 1, at A1.
84. Darmer, *supra* note 78, at 651.
85. Linda Keller, *Alternatives to* Miranda: *Preventing Coerced Confessions via the Convention Against Torture*, 10 CHAP. L. REV. 745, 751 (2007). The DTA amended the MCA. *Id*.
86. Darmer, *supra* note 78, at 651-52; *see also* Keller, *supra* note 85, at 751 (further explicating provision of the MCA).
87. *See* Darmer, *supra* note 78, at 651.
88. Keller, *supra* note 85, at 749.
89. Darmer, *supra* note 78, at 651 and n.118.
90. Keller, *supra* note 85, at 749-50.
91. *See id*. at 748-53.
92. *See generally* Darmer, *supra* note 5, at 639 (quoting Richard Cohen).

o o o o o

MICHAEL BRYANT

AMERICA'S SPECIAL PATH: U.S. TORTURE IN HISTORICAL PERSPECTIVE

> Torture . . . is a plague infecting our whole era.
> —Jean Paul Sartre
>
> Torture is at the deadly heart of national security.
> —Mark Danner
>
> . . . if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.
> —John Paul Stevens
>
> What the Administration is trying to do is create a new legal regime.
> —John Yoo

German philosopher Georg Friedrich Hegel affirmed that our understanding of a historical event deepens with the passage of time and as the era that produced the event recedes from us.[1] His aphorism, "The Owl of Minerva spreads its wings only with the falling of the dusk,"* seems especially pertinent to countries as they reflect on their history of human rights abuse. Once a nation accepts the historical truth of its crimes, it is a natural step to compare them with the misdeeds of other countries and other eras in search of the unique qualities (if such can be proven) that lead toward atrocity. For decades in Germany after World War II, German intellectuals debated whether a "special path" (Sonderweg) of historical development explained the great disasters of their history—the collapse of the Weimar Republic, the rise and triumph of Nazism, and the occurrence of the Holocaust.[2] They were in search of an explanation for their nation's moral and political calamities, one that would either invite comparison with other monstrous eruptions of state power in 20th century history or prove the uniqueness of the German experience. We might conduct a similar inquiry into the program of "enhanced interrogation" carried out by the Bush Administration between 2002 and 2004 by posing the following questions: Was the American program comparable to other cases of state-administered torture in European** history? What comparisons, if any, may be drawn? How is American torture similar to other episodes, and how is it different? In exploring these questions, our purpose is to identify the essence of American torture by comparing it to similar events in history.

At first blush, American torture resembles forms practiced elsewhere by other democracies, such as the French in the Algerian War (1954-62). Resemblance, however, is not identity.[3] The thesis of this essay is that American torture, while

---

* Hegel introduced this quote in *The Philosophy of Right.*

** For reasons of economy, this essay will focus on torture chiefly within European history.

Michael Bryant is an Assistant Professor of Legal Studies at Bryant University. He teaches in the Department of History and Social Sciences.

ringing the changes on familiar themes, remains singular and irreducible. This assertion may be properly examined by placing the U.S. example within a historical continuum of state-authorized torture. When this is done, it will be evident that the U. S. interrogation program, based on a category of detainee embellished, if not invented, by the Bush Administration, has an affinity with earlier forms of official torture. Constructing a category of persons stripped of legal protection has been exceedingly useful for torture regimes of the 20th century in curtailing rights under domestic and international law—particularly the totalitarian states of Nazi Germany and Stalin's USSR. The invention of a category of person deprived of legal rights has practical implications for torture in both totalitarian states and democracies. State enemies are made the object of "special law" (*Sonderrecht*),[4] which aims to reduce or remove legal protections afforded them. The Bush Administration's use of the term "enemy combatants" evokes the definition of state enemies in totalitarian legal systems. In both cases, an alleged state of emergency enabled the executive authority to flense designated persons of legal protection, leading to their torture by national security agents.[5]

However, American torture during the "Global War on Terror" presents a characteristic that distinguishes it from previous forms. Unlike totalitarian law and the French army in Algeria, the Bush Administration sought to create a worldwide geography of torture, comprising zones of lawlessness in which everything was permitted relative to the treatment of enemy combatants. These were areas fortified against the penetration of domestic and international law: places like Guantanamo Bay (Cuba) and CIA-administered "black sites" scattered across the world, from Eastern Europe and Morocco to the Near East and Indochina.[6] In their wilful creation of a geography of torture intended to avoid the restrictions of U.S. domestic and international humanitarian law, the Bush Administration overturned a trend of extending legal protections and immunities reaching back to the Enlightenment. This, it will be argued, is the special path of American torture.

I. Official torture from the Romans to the Age of Enlightenment

Initially, we must clarify the working definition of torture. Following legal historian John Langbein, we will construe the word "torture" as referring to "the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings."[7] In addition to the evidence-producing function of torture, the definition will include the deliberate infliction by government officials of physical and mental suffering to extract information unrelated to court proceedings. This second meaning of torture is important because the American program employed torture as an instrument of intelligence gathering, allegedly to preempt future terrorist attacks or discover terrorist accomplices.[8]

The roots of torture are deeply entwined with Western history. For the Greeks, torture was one of the five proofs accepted in a judicial proceeding.[9] Until the time of the Roman Empire, neither the Greeks nor the Romans allowed the torture of free men; instead, they restricted torture to slaves and (among the Greeks) sometimes to foreigners. This time-honored immunity of free men to official

torture began to erode during the Roman Empire, when the emperor created an exception to facilitate the torture of free Romans. The exception arose whenever the emperor declared a state of emergency. In effect, the Romans forged what the Roman historian Tacitus called a "new jurisprudence"—a set of extraordinary procedures to address the crime of *maiestas* (an offense against the emperor himself), which over time evolved into the crime of treason. As imperial power expanded, so did the range of cases in which free Roman citizens could be subjected to torture. By the third century C. E., in addition to slaves and those accused of treason, "dishonourable" persons and plebeians generally became susceptible to torture.[10]

Torture disappeared from Western Europe after 500 C. E., chiefly because compurgation* and trials by ordeal determined the outcomes of disputes within the Germanic kingdoms that superseded the western half of the Roman Empire. This changed by the High Middle Ages, when the practice re-entered Medieval criminal procedure. The recrudescence of torture was due to several factors, including the abolition of trial by ordeal in 1215, the late 11th century rediscovery of the Law Code of Justinian, and the growth and diffusion of Roman canon law. Among these historical conjunctures, the abolition of ordeal may have been the most pivotal. In its aftermath, judicial officials in Western Europe had to devise alternative ways to decide cases. The English turned to jury trials, while the Europeans employed inquisitorial methods of adjudication. In both canon law and Justinian's Code, conviction was possible only through one of two means—the testimony of at least two eyewitnesses or the confession of the accused. Given the unlikelihood of multiple witnesses to a crime, confession became the prime mode of conviction for serious offenses. (By the 14th century, confession had received its lofty title of "the queen of proofs.") When the accused declined to confess, medieval judicial officials resorted to torture to extract the confession needed to convict.[11]

When trial by ordeal was abolished in 1215, French judges adopted a dual system of "ordinary" and "extraordinary" procedures to prosecute accused criminals.[12] Ordinary procedure was remarkably liberal in the rights afforded the accused, which included the right to examine adverse evidence, to hear the testimonies or affidavits of government witnesses, and to be informed of the government's case. Torture was not allowed in ordinary procedure. Some types of cases, however, were considered especially odious, hence inappropriate for the relaxed standards of ordinary procedure.[13] In such cases the French authorities turned to extraordinary procedure, in which the rights afforded the accused were abridged; defendants were not informed of the charges they faced, testimony was secret, and interrogation was conducted using torture. By the mid-1500s extraordinary procedure had usurped ordinary procedure, becoming a cornerstone of French Medieval criminal procedure. The judicial practitioners of torture sought above all to wrest a confession from the accused. This variant of torture, called the *torture prèparatoire*, occurred

*That is, oath-helping.

during the findings stage of the trial, as the inquisitorial judge gathered evidence on which to base his verdict.[14]

Torture as a tool for securing confessions and generating evidence continued until the 18th century, when it came under scorching criticism by the philosophes of the Enlightenment. One historiographical school[15] contends that the new value attached to reason and human dignity among Enlightenment publicists like Cesare Beccaria and Voltaire, who inveighed against torture as the monstrous residue of a cruel and superstitious age, powered the backlash against torture. Langbein, by contrast, discounts this view as a "fairy tale." For Langbein, fortuitous changes in the 18th century law of proof dispensed with the need to secure a confession. Lacking a motive to torture, the practice simply shrivelled away.[16] Whatever the explanation, whether purely moral, purely juridical, or a synergistic effect of both, torture had disappeared from European law and society by the 19th century.

II. The return of torture: the 20th century

Experts propose that torture entered the realm of the unthinkable in the 19th century. In the words of Pierre-Henri Simon, the 19th century

> . . . had at least a kind of modesty which our own no longer possesses: even when its tribunals condemned the innocent, . . . they preserved at least enough of the humanist and Christian spirit implied in the Declaration of the Rights of Man and in the penal code which it inspired to spare those it indicted from torture . . . However hardened they might have been, neither Vautrin nor Javert ever imagined that they had the right to torture a suspect.[17]

In the 20th century, however, torture reappeared in the very midst of modern and modernizing societies. According to one scholar, Alec Mellor, torture re-entered Western history through two portals: the rise of totalitarian states and the formation of national security organizations tasked with gathering intelligence.[18] Assuming that Mellor is correct, where does the U.S. torture program fit into the recent history of Western torture? In pursuing an answer to this query, we will consider the theory and practice of torture in the two *exempla* of modern totalitarian governments in Europe—Nazi Germany and Stalin's Soviet Union—before turning to the French in the Algerian War as an illustration of torture by the democratic national security state. Through close examination of these representative cases, we will erect a framework in which an answer to the question about the singularity of American torture may be found.

1. The theory underlying torture in totalitarian law: Arendt's "objective enemy"

As in all political systems, totalitarian states entertain a conception of human beings in their relations with the state. Whereas in Western liberal countries individuals have rights that protect them from arbitrary interference by government, totalitarian systems, like the premodern monarchies they vaguely resemble, insist on the unlimited power of the state to assign rights to the people living within its borders. This authority of government as a prescriber of rights has grave implications for criminal procedure, civil liberties, and the resort to torture. Because

the totalitarian state asserts its unconditional power to allocate rights, it is able to construct a category of criminal suspect placed beyond the legal protections enjoyed by other citizens, thereby violating a basic norm of Enlightenment legal reform: the equality of all citizens before the law. In *The Origins of Totalitarianism*, Hannah Arendt calls this category of suspect the "objective enemy." For Arendt, the objective enemy is the foundation of the totalitarian political system, the mountain glacier that feeds the toxic valley streams of its criminality.

Every society must protect itself from persons who would do it harm. Typically, such persons commit an injurious act defined by the society as a crime. The denomination of an action as a crime is a "speech act" in the Austinian sense: it sets in motion a train of real-world events, from the arrest, charging, and prosecution of the offender to conviction, sentencing, and execution of punishment.[19] In the totalitarian state, such individuals are punished just as they are in non-totalitarian societies. In addition to the criminal "suspect," however, the totalitarian state adds to its penal arsenal another category of persons liable to government suppression, the "objective enemy." Objective enemies are considered a danger to the state not because of their harmful actions, but because, in Arendt's words, they are "carriers of tendencies."[20] This distinction between the suspect and the objective enemy enables the arrest and persecution of people who have committed no discernible offense. An administrative law scholar of the Nazi era, Theodor Maunz, succinctly expressed the idea of the objective enemy:

> By eliminating dangerous persons, the security measure . . . means to ward off a state of danger to the national community, independently of any offense that may have been committed by these persons. [It is a question of] warding off an *objective* danger.[21]

For the National Socialists, the objective enemy was multi-faceted—Communists, Socialists, trade unionists, Jews, and the Sinti and Roma; for the Bolsheviks under Stalin, they were "counterrevolutionaries," the alleged bearers of bourgeois tendencies.

Arendt argues that the suspect/objective enemy binary has an important counterpart in totalitarian criminal law—the contrast between the "suspected offense" and the "possible crime." Because objective enemies are bearers of dangerous tendencies, they enter the realm of the "possible" crime (as opposed to consummated crimes), permitting the state to treat them differently from other groups. No matter how speculative or unproven their guilt, objective enemies must be reckoned with, inasmuch as their mere existence within society might conceivably be detrimental to its wellbeing.

The possible crime, Arendt writes, "is based on the logical anticipation of objective developments"—meaning that "every crime the rulers can conceive of must be punished, regardless of whether or not it has been committed."[22] An immediate obstacle to proceeding against such persons is the equality principle of Enlightenment jurisprudence, codified, for example, in Article 109 of the Weimar Constitution, which stipulated the general equality of all citizens before the law.

Modern totalitarian states must overcome this limitation in order to successfully deprive objective enemies of legal protection. This is accomplished via special law (*Sonderrecht*).

2. Special circumstances require special law: Torture and the *Sonderrecht*

In order to vault over the provisions of the legal system that forbid torture, totalitarian governments invoke a state of emergency that requires suspension of ordinary law. Hitler exploited the Reichstag fire of February 27, 1933 to engineer the declaration of an emergency based on an alleged plot by Communists to overthrow the government.[23] The German President von Hindenburg, convinced by the Nazis that the state faced imminent peril, suspended the Weimar Constitution as Article 48 allowed in such circumstances, but only until the emergency had abated.[24] What should have been a temporary measure became permanent as the state of emergency was normalized, resulting in the de facto repeal of the Constitution and, in the wake of the subsequent Enabling Act of March 24, the installation of Hitler's dictatorship.[25] A critical step had been taken in the direction of Nazi torture: with Article 109 reduced to an empty husk, the Nazi regime could replace the liberal doctrine of equality with its creed of racial inequality. The bramble-strewn path to persecution was bulldozed, and the way now lay open to torturing the state's objective enemies.[26]

Vilified by the Nazis as "weak" and "liberalistic," the principle of legal equality likewise found cold comfort in Stalin's USSR. The Soviet Code of Criminal Procedure (1923–24), section 136, forbade police interrogators from using coercion or threats of violence to extract information. Under Stalin, section 136 was interpreted to apply only to non-political crimes; in "political" cases, however, in which the survival of the Revolution was at stake, all means were justified in its defense. Although Soviet police torture dated back to the state's founding (the Cheka used it already during the civil war), it did not become routine until the late 1930s. A telegram from Stalin to the People's Commissariat for the Interior from January 1939 conveys the essence of totalitarian torture in its disdain for the principle of equality:

> It is known that all bourgeois intelligence services use methods of physical influence against the representatives of the Socialist proletariat and that they use them in their most scandalous forms. The question arises as to why the Socialist intelligence service should be more humanitarian toward the mad agents of the bourgeoisie . . . The Central Committee of the All-Union Communist Party considers that physical pressure should still be used obligatorily, as an exception applicable to known and obstinate enemies of the people, as a method both justifiable and appropriate.[27]

The "known and obstinate enemies of the people" to whom Stalin refers were, in fact, innocent of wrongdoing. Nonetheless, exceptional circumstances required and legitimated their torture—not because they committed antisocial acts, but because of their membership in a group considered dangerous by the state.

In both Hitler's Germany and Stalin's USSR, a state of emergency was continuously present, and world-significant values were always in danger: for

the Nazis, the fate of the Aryan race and its socio-political embodiment, the *Volksgemeinschaft* ("people's community"); for Stalin's USSR, the Revolution, identified with Stalin and the Bolsheviks. Because totalitarian society is always under threat, it seeks self-defense by suspending the principle of legal equality. In this way, what Nazi jurists like Carl Schmitt derided as the "abstract equality" of liberalism was redefined in favor of "concrete equality," or equality based upon group characteristics like racial purity or political orthodoxy. As the German historian Diemut Majer has perceptively observed, this substitution of "concrete" for "abstract" equality represents "the destruction of the individual as a legal personality."[28] The implication for torture in the case of Nazi Germany is clear: pure-blooded members of the racial community were immune from torture, while special law would approve its infliction on objective enemies.

3. The practice of torture in totalitarian society

The forms and venues of torture conducted in Nazi Germany and the USSR under Stalin were multitudinous, far exceeding the scope of this essay. The essential point here is that torture became an official policy of police interrogation in both regimes, and in each case it targeted objective enemies. From the onset of the Nazi government, a pattern quickly emerged of top-echelon government approval of torture carried out by Nazi auxiliaries (the Gestapo and SA) on Communists and Socialists. When a group of Socialists were prosecuted in November 1934, they argued in their defense that the Gestapo had tortured them during interrogation. No efforts were made to prosecute the police herein implicated. The courts subsequently prepared charges against other Gestapo and police officials accused of beating confessions from suspects, which Hitler promptly quashed. Hitler's intervention to promote police torture was sometimes more direct, as in the case of an alleged child murderer whom he personally ordered tortured into making a confession. In 1937 the German judiciary approached the Gestapo about its interrogation techniques, not to object to them but to plead for their regularization. In response, the Gestapo agreed to limit its coercive methods to accused "traitors." Such "limitation" had little practical effect, inasmuch as the police continued to torture Communists as "traitors," then extended it to "clandestine networks of homosexuals."[29]

The Gestapo practice was ten blows with a "standardized stick," administered in the presence of a doctor. Technically, beatings had to be approved by Gestapo Headquarters beforehand, although this office could (and frequently did) authorize torture retroactively. In addition to beating, Nazi interrogators deprived their suspects of food, light, and sleep. Concerned that mainstream criminal justice officials would hesitate to apply harsh tactics like beating a prisoner unconscious, the Gestapo sent their suspects to the Columbia House detention center in Berlin rather than to ordinary prisons, aiming to extract confessions useful in criminal trials.[30]

Stalin's secret police were driven by similar motives to secure confessions from detainees. In one instance a military commander faced a charge of seeking to turn his tanks against the government during a parade. His interrogators drove needles

under his fingernails, filled him to the bursting point with water, and excoriated his back with a grater.[31] Such measures were actively encouraged—and even instigated—by Stalin. In a note concerning one prisoner, Stalin asked, "Can't this gentleman be made to tell of his dirty deeds?"[32] In the course of the 1952 "Doctors Plot" investigations, Stalin was an initiator of coercive interrogation, ordering the police to "beat, beat, and beat again" one of the alleged conspirators. In addition to the methods listed above, Soviet police deprived their suspects of sleep by means of the "conveyor" method—prolonged questioning lasting for days by rotating teams of interrogators. Osip Mandelstam reported that he was forced to stand for days without sleep while being questioned under bright lights, a procedure that deeply harmed him psychologically.[33]

The venues for Nazi and Stalinist torture were within each country's national borders. Before the war, the Gestapo, Storm Troopers (SA), and Protection Squad (SS) used coercive interrogation throughout Germany, with little concern for intervention by judicial authorities. During World War II, they employed torture in police detention centers and concentration camps in occupied Europe, usually for the purpose of discovering information about partisan activities.[34] Stalin's secret police conducted torture in the very midst of populous centers, as in Moscow's Lubyanka prison, where untold numbers of prisoners, including Aleksandr Solyhenitsyn and Raoul Wallenberg, were interned and tortured. In neither case did totalitarian government flinch from attacking its objective enemies. The geography of torture was immaterial because the executive claimed unfettered authority under "special law" to defend national security, construed by the Nazis as the racial community, by the Soviets under Stalin as the Revolution. Within the territory under his control, neither Hitler nor Stalin recognized a zone of privacy for "state enemies" beyond the brutal reach of the special law.

These acts might be taken as strange atavisms were it not that non-totalitarian governments in the 20th century have used torture, including Western democracies. This brings us back to Alec Mellor's contention that the rise of national security organizations dedicated to producing intelligence contributed to the revival of torture in the 20th century. One of the most flagrant instances of democratic torture is French interrogation policy during the Algerian War.

4. Democracy and torture: the French in Algeria

The modern French state has an antipathy toward torture seasoned by two centuries of Enlightenment culture. The French revolutionaries' abolition of torture on October 8, 1789, was the culmination of decades of anti-torture agitation, which, as we have seen, deplored the practice as both cruel and irrational.[35] Article 303 of the French Penal Code of 1791 placed the exclamation point on the unconditional prohibition by making torture a capital offense. Interestingly, even during the internecine spasms of the Terror and the Vendée uprising, the French government abstained from torture. Revulsion against *la question*, as it was called, continued throughout the 19th century, a period when torture became inconceivable for professional law enforcement in France. From 1929 until the German invasion of France in 1940, French police did employ a method of tor-

turous interrogation resembling the American "Third Degree," a practice called the *passage à tabac* ("rough handling"); however, French suffering under SS and Gestapo torture during the occupation reaffirmed the nation's abhorrence of *la question*.[36]

Given this background, then, the outbreak of something approaching systematic torture during the French Algerian war seems extraordinary and unprecedented. Like the instances of totalitarian torture we have considered, and suggestive of the American program to be discussed shortly, French torture was enabled by Parliament's declaration of a "state of emergency" in response to the Algerian revolution of November 1, 1954.[37] The emergency law passed on April 1, 1955, curtailed Algerians' civil liberties, implementing late evening house searches, imposing a curfew, and closing theatres and cafes, among other measures. As a proximate cause of torture, the most important feature of the law was the provision authorizing French police to place suspects under house arrest without judicial supervision. In reality, this meant that the police could detain suspects at will in their stations or in army barracks. Both locations became centers for torture and summary execution of detainees. The fact that French police and military authorities in Algeria flouted a paragraph in the emergency law that forbade such detention indicates the degree to which they had achieved independence from the central government in Paris. Roughly a year after its passage, the emergency law was replaced by a successor law, which invested the government with "special powers" to combat the revolt. The special powers law now authorized the use of detention camps in the Algerian war.[38]

The leading figure in the growing resort to torture by French authorities in Algeria was General Jacques Massu, Commander of the battle-hardened 10th paratrooper division. Alarmed by nationalist bombings and assassinations, the Governor-General in Algeria, Robert Lacoste, reinforced the 1,500 police in Algeria with Massu's 4,600 soldiers on January 7, 1957. Even more significant was Lacoste's decision to transfer full police powers to Massu to maintain public order in Algiers, the capital city. Massu was an advocate of torture, writing about coercive interrogation in March 1957 that "the *sine qua non* condition of our action in Algeria is that these methods be admitted, in our souls and consciences, as necessary and morally valid."[39] In a 1971 book, Massu demonstrated little change of heart in his attitude toward *la question*: while admitting his responsibility for his troops' use of torture on detainees, he justified it as a means to combat terrorism and save innocent lives.[40] Massu's torture regime was *sub rosa*. In a secret order of April 4, 1957, he instructed his interrogators that "the most absolute secrecy must be ensured on anything concerning the number, identity and the nature of suspects arrested. In particular, no mention of whatever kind is to be made to any representative of the Press."[41] Terrorist suspects who refused to talk fell into the hands of Massu's Detachment of Operational Protection (D.O.P.) for questioning. If they furnished the information demanded, they were often released; if not, they were subjected to coercive interrogation of a severity that could be fatal. According to historian Alistair Horne, the refinement of torture

techniques by the D.O.P. marked the point when the French army in Algeria adopted torture as a policy.[42]

The preferred method of torture was the *gégène*, in which electrodes were attached to body parts—especially the penis—and the detainee shocked with electricity. Massu and his staff tested the procedure on themselves and found it satisfactory. The fact that the *gégène* left behind no traces of abuse recommended it, and it became a favorite in the D.O.P.'s torture arsenal. Other techniques included variations on "water torture"—plunging prisoners' heads into barrels of water, pumping their stomachs and lungs full of cold water with a hose (a method of abuse used by the SA in Nazi concentration camps before the war), and assaults on their personal dignity, such as raping Muslim women with bottles and sodomizing prisoners with pressurized hoses.[43] If, after these methods were tried, prisoners still refused to talk, they were liable to being murdered. An army liaison officer in Algiers in 1957, Paul Aussaresse, confirmed in November 2003 the systematic use of torture and "disappearances" of terrorist suspects by the French Army. His estimate of deaths associated with army "house arrests" by French troops is stunning: of the 24,000 house arrests, 3,024 detainees disappeared. These persons were killed summarily, tortured to death, or murdered after torture failed to produce a confession.[44] The corpses were disposed through a program unofficially called "walking in the woods," in which they were dropped into the sea by helicopter or buried in mass graves.[45]

Two aspects of the French experience in Algeria are notable. First, the torture program appears to have originated within the French army, not the government in Paris. It was the army that devised coercive interrogation, conducted it secretly and with multiple cover-ups, and defended it vocally when details became public. From the beginning of the conflict in 1954, the French government gave the army carte blanche to suppress the Algerian revolution as it saw fit. Insofar as it abdicated control over the military in Algeria, the French government was culpable.* This notwithstanding, its culpability should be tempered by acknowledgment that the French army in Algeria had become an autonomous political force, cut loose from control by the central government. The Algerian war is a case study in "military drift"—the tendency during periods of war to entrust executive policymaking in the conduct of military operations to the armed forces.[46] Removed from civilian control, unconcerned with the legal and humanitarian implications of their policies, army officials focused single-mindedly on the bottom-line: to crush the revolution, prevent further terrorist attacks, and keep Algeria a French possession. As evidence of torture emerged, the French government responded by blaming excesses on lower ranking soldiers in the chain of command, an excuse

* Not until 1956 did the French government acknowledge that the Geneva Conventions of 1949 applied to the Algerian conflict. Until that time, the French insisted that, as an internal conflict within French territory, the Algerian war was outside the parameters of the Conventions, which applied only to international conflicts. One cannot but wonder what the effects of this policy were on the thinking of army policymakers and interrogators in Algeria. The situation bears comparison with President Bush's denial of Geneva protections to Al Qaeda and Taliban detainees in February 2002.

similar to the Bush Administration's "bad apples" theory. By 1959 the government moved to rein in the army and stop torture. President Charles De Gaulle conveyed to General Marcel Bigeard, Commander of the Ain Sefra sector, that torture was impermissible. Bigeard reportedly relayed this message to his troops with the following equivocation: "No more torture, but still torture."[47] Bigeard's rejection of civilian control over the army was symptomatic of the military's independence of the French government, and of the extent to which military drift was driving coercive interrogation in Algeria. The sequel was a putsch organized in Algeria by retired army generals to overthrow De Gaulle's government in 1961.

The second aspect of the Algerian case is related to the first, and has to do with the geography of torture. Because Algeria was considered French territory, the torture of detainees was often justified as a tool for enabling France to retain it. The urgency within government and military circles to keep Algeria French was undoubtedly influenced by the country's earlier humiliations in Indochina, Tunisia, and Morocco, and the war drew much of its ferocity from a widely felt resolve to avoid further national humiliation. Nonetheless, the distance between the government in Paris and the military authorities in Algiers was significant enough to unleash the military from civilian control, abetting a military drift that led to the systematic torture of suspected terrorists. Like all military organizations, the French army was essentially totalitarian; left to its own devices, it employed totalitarian techniques of interrogation that recall the methods of the Gestapo and the GPU. Whatever its faults, however, the central government did not conceive the torture program, embellish it with legal sophistries, and order its implementation by military and state security forces. Geography played a role in ensuring military atrocities, but the central authorities, complicit through their failure to supervise the army, did not themselves create objective enemies and the lawless spaces in which detainees could be abused. In this regard, the French example stands in stark contrast to Bush Administration policies.

III. The singularity of American torture: Examining the USA's special path

In the aftermath of graphic photographs released to the public in May 2004 depicting the abuse of detainees at the Abu Ghraib prison in Iraq, members of the Bush Administration employed two strategies to defuse the uproar. First, they blamed the Abu Ghraib events on low-ranking "bad apples" acting not on orders from higher authority but on their own sadistic impulses. Second, they justified other kinds of "enhanced interrogation" on the grounds that they were required to defend the American people from terrorist attack. The first of these assertions was a falsehood; the second opens a revealing insight into the basic rationale supporting, in the minds of Bush administration officials, the creation of special law to deal with "enemy combatants."[48]

1. State of emergency and special law

As with the other histories of torture considered thus far, the American interrogation program began with the announcement of a national emergency.

President Bush proclaimed a national emergency on September 14, 2001, based on the September 11 attacks. Three days later, he issued a directive enabling the CIA to conduct covert operations without the need to seek authorization for specific actions performed under them. Moreover, the directive expanded the CIA's extant program of "extraordinary rendition"—a policy that, in the view of American foreign policy scholar Chalmers Johnson, violated the UN Convention on Torture. If Johnson is correct, then the first torture-related war crime of the Bush administration was perpetrated less than six days after 9/11.[49]

The "national emergency" framed a second Bush order of November 13, 2001, which proved to be of surpassing importance in the creation of special law. "Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States," Bush declared, "and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency."[50] His hand strengthened by the emergency facing the country, Bush asserted the necessity of detaining terrorist suspects and prosecuting them for war crimes in "military tribunals." These tribunals would not apply the rules of evidence observed in federal district courts; rather, any evidence deemed by the "presiding officer" to "have probative value to a reasonable person" would be admissible. Detainees would have neither the right to a jury trial nor to a unanimous verdict to convict. Appellate review was restricted to Bush or, if he so designated, the Secretary of Defense, Donald Rumsfeld. The order went on to vest these military tribunals with exclusive jurisdiction over detainees' trials—meaning that detainees would have no legal recourse to U.S., foreign, or international courts.[51]

2. Setting aside Geneva: The fateful months of early 2002

The Bush order of November 13, 2001, helped set the ground rules for a special law applicable to certain types of persons—i.e., members of Al Qaeda and their confederates. Such individuals would not enjoy U.S. Constitutional or international legal protections, nor could they be tried in a judicial venue other than military tribunals. Bush promulgated his order at a time when Taliban and Al-Qaeda members were falling into the hands of U.S. military forces in Afghanistan. Once captured, the detainees received treatment consistent with the Geneva Conventions—a fact that rankled Donald Rumsfeld, his general counsel, William Haynes, Vice President Dick Cheney and his counsel, David Addington, and Alberto Gonzales, Bush's counsel, all of whom objected to extending Geneva's protections to Taliban and Al-Qaeda fighters captured in Afghanistan. These events prepared the stage for a sequence of memoranda in early 2002 that were crucial to the evolution of American torture. The applicability of the Geneva Conventions was addressed in a memorandum of January 9, 2002, authored by two lawyers in the Office of Legal Counsel (a Justice Department office), Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty. The memo argued that, because "the Taliban was not a government and Afghani-

stan was not . . . a functioning State" during the U.S.-Afghan war, Geneva did not apply to the detainees. On Haynes's recommendation, Rumsfeld instructed General Richard Myers, Chairman of the Joint Chiefs of Staff, that Al Qaeda and Taliban detainees were not entitled to prisoner of war status under Geneva. He urged that U.S. forces treat the detainees "humanely" and "in a manner consistent with the principles" of Geneva, but made such treatment dependent on the demands of "military necessity."[52]

Bush accepted the position of the Department of Justice that Geneva did not apply sometime on or around January 18, 2002. In the meantime, Secretary of State Colin Powell had registered a vigorous dissent from Rumsfeld's decision, recommending that Bush reconsider his previous endorsement. On January 25, 2002, Gonzales submitted a memo to the President defending the anti-Geneva views of Yoo, Haynes, and Rumsfeld.[53] In this memo, Gonzales rehearsed Yoo's analysis holding that Afghanistan, as a "failed state," fell outside Geneva's protections. Stressing that the war on terror was "a new type of warfare" unforeseen by the authors of Geneva in 1949, Gonzales declared that "a new approach in our actions toward captured terrorists" was necessary. In this new kind of war, "the ability to obtain information from captured terrorists" in order to prevent murderous attacks on Americans was essential. A "new paradigm" of international law had emerged from the rubble of the twin towers on 9/11, one that "renders obsolete Geneva's strict limitations on questioning of enemy prisoners . . . ."[54] Gonzales's memo had found its mark. On February 7, 2002, Bush issued a memorandum to Cheney and other high-ranking officials reiterating, in tone and substance, the views of Gonzales and Yoo. "The war against terrorism ushers in a new paradigm," he wrote. "Our nation recognizes that this new paradigm . . . requires new thinking in the law of war." The "new thinking" required under the "new paradigm" was the suspension of Geneva's Common Article 3 protections from application to Al Qaeda and Taliban detainees.[55]

Bush identified several reasons for denying these detainees "Prisoner of War" (POW) status. Al Qaeda was "not a High Contracting Party to Geneva," as required by Common Article 3; furthermore, Geneva applied only to "armed conflict not of an international character," a standard the war in Afghanistan failed to meet. Bush's third reason for refusing to treat the detainees as POWs, however, struck a different and more ominous chord. He wrote that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." The term "unlawful combatants"—used interchangeably with the term "enemy combatants" in Bush administration legal parlance—does not exist in international law. The authors of the Geneva Conventions and the community of scholars who interpret them do not accept the designation of a prisoner as an enemy combatant as a justification for avoiding Common Article 3. The term has an ephemeral history, having surfaced in only one prior case from the 1940s, *Ex Parte Quirin* (1942), in which the U.S. Supreme Court approved the use of military commissions to try Nazi saboteurs captured within U.S. territory as enemy combatants.[56] It is not a purpose of this essay to assess the validity of

Quirin today. Rather, it is critical to see that the term "enemy combatant" was largely invented by the Bush administration to add a patina of legitimacy to its policy of stripping terrorist suspects of their civil and human rights. The journalist Jane Mayer writes of enemy combatants:

> The designation encompassed not just members of Al Qaeda and the Taliban but also anyone who associated with them, supported them, or supported organizations associated with them, even if unwittingly. In 2004, a Bush Administration lawyer told a judge that, in theory, an enemy combatant could even be a "little old lady in Switzerland" whose charitable donations had been channelled, without her awareness, to Al Qaeda front groups.[57]

The "enemy combatant" construct is central to both prosecution of detainees in minimalist military tribunals and the American interrogation program under Bush. Indeed, the assertion of authority to label persons as "enemy combatants" may be the most breathtaking challenge to the rule of law by the Administration. The simple identification of a suspect as an enemy combatant, on the Bush theory, removed that person from conventional legal protection. In federal lawsuits by detainees seeking access to U.S. federal courts, the government argued for Bush's authority as Commander-in-Chief to deny ordinary legal rights to enemy combatants. The position staked in the government's briefs represents a *non plus ultra* in the "global war on terror:" no branch of government could review the supreme chieftain's decisions in protecting the country from terrorist attack. In its brief in the *Hamdi* case, the government characterized its use of the enemy combatants label as a "quintessentially military judgment," one better entrusted to the armed forces than to Article III courts.[58] These cases furthermore reveal that, from early on in the "war on terror," the Bush Administration had expanded the definition of enemy combatants to include U.S. nationals. Yaser Hamdi and Jose Padilla were American citizens, but their nationality did not prevent their deprivation of basic constitutional rights once they acquired the fatal designation of enemy combatant. Kim Lane Scheppele writes of Padilla:

> The [Department of Defense]. . . took the position that Padilla was not entitled to see his lawyer, that he could be held indefinitely as an enemy combatant in a military jail without charges or without any means of communication with the outside world, and that he was in general beyond the reach of the ordinary legal system. The DOJ argued that habeas review was simply not available to those whom the President had deemed enemy combatants.[59]

When considering the U.S. interrogation program, due consideration should be given to the special legal status ascribed to "enemy combatants" in the Bush Administration's theories of elementary civil rights. Its creation of a category of disemancipated individuals in the months after 9/11 facilitated the American torture program which took shape in late 2002. To enemy combatants special law would be applied, a kind of law that approved not only indefinite detention without charge, but torture in furtherance of state security. The convergence of the enemy combatant classification with special law appears in its starkest form in the notorious "torture memos" of August 1, 2002.

3. Redefining torture: the Yoo/Bybee memos

In the months preceding August 2002, the Bush administration was involved in feverish exploration of enhanced interrogation measures. In December 2001, William J. Haynes sought information from another Department of Defense office, the "Joint Personnel Recovery Agency" (JPRA), which for decades had trained American military personnel in resisting techniques of interrogation considered illegal under Geneva.[60] The program overseen by JPRA was "Survival Evasion Resistance and Escape" (SERE). According to a JPRA instructor who was quoted in a Senate Armed Services Committee investigation into detainee treatment, SERE was "based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years." Techniques included stripping students naked, contorting them into "stress positions," hooding them, depriving them of sleep, treating them like animals, and exposing them to loud music, flashing lights, and extreme heat or cold. The inventory of techniques also included slapping and waterboarding. Haynes's general counsel office enlisted the JPRA in assisting its development of a detainee interrogation program. Collaboration between JPRA and Haynes's office began in the spring of 2002.[61]

In July 2002 JPRA furnished Haynes's office with a variety of materials from SERE training, including lists of techniques. The DoD Deputy General Counsel, Richard Shiffrin, testified before the Senate Armed Services Committee that the General Counsel's Office wanted to "reverse engineer" the SERE techniques for interrogation of terrorist suspects. DoD's interests in gleaning intelligence from detainees ran parallel with similar efforts by the CIA, which sought approval from the National Security Council of its own interrogation tactics in the spring of 2002. The capture on March 28, 2002, of a "high-value detainee" in Pakistan, Abu Zubaydah, lent urgency to the CIA's request for official backing. ABC News reported at the time that the CIA informed top members of the Bush administration of Zubaydah's capture, among them Dick Cheney, Condoleeza Rice, and John Ashcroft. These persons attached their signature to the CIA's interrogation plan. The torture of Zubaydah began shortly thereafter and was conducted in an undisclosed location in Thailand. Mark Danner describes the opening stages of his interrogation:

> A naked man chained in a small, very cold, very white room is for several days strapped to a bed, then for several weeks shackled to a chair, bathed unceasingly in white light, bombarded constantly with loud sound, deprived of food; and whenever, despite cold, light, noise, hunger, the hours and days force his eyelids down, cold water is sprayed in his face to force them up.[62]

The CIA was not operating a renegade operation with Zubaydah's interrogation. CIA Director George Tenet briefed high-level Bush officials on the techniques used, which included slapping, pushing, deprivation of sleep, and "simulated drowning." The latter method, better known as "waterboarding," was applied in July 2002, after Bush officials authorized the CIA to employ "more aggressive techniques" on Zubaydah. ABC related that Tenet's briefings, designed

to clothe the operation in legal cover, sometimes involved "choreographed" demonstrations of interrogation sessions, provoking Attorney General Ashcroft to snap, "Why are we talking about this in the White House? History will not judge this kindly."[63]

Ashcroft's apprehensions were well-founded, and were apparently shared by other Bush officials in the spring and summer of 2002. The White House and Bush's counsel, Alberto Gonzales, wanted a "golden shield"[64] from the Justice Department, certifying that the proposed interrogation techniques were legal and that CIA interrogators would be immune from prosecution for violations of international and U.S. domestic law. Foremost among their concerns was the Torture Convention of 1984 and its codification in 18 U.S.C. §2340 et seq. They turned to the Office of the Legal Counsel (OLC) at the Justice Department for their golden shield. Within the executive branch, a legal opinion from the OLC was authoritative. In prior administrations, when invited to prepare a legal opinion by the President, OLC had canvassed other departments within the government for feedback on the proposed action. On this occasion, OLC excluded the State Department from the process of review, a sign that the White House had a preconceived result in mind that it knew the State lawyers were reluctant to provide.[65] Instead, OLC consulted a reliable stalwart of executive authority, John Yoo, who had previously authored memoranda denying the applicability of the Geneva Conventions to Al Qaeda and Taliban detainees. On August 1, 2002, OLC issued two legal memoranda under the signature of Jay Bybee, the Assistant Attorney General. Addressed to Alberto Gonzales, the first memo addressed "standards of conduct for interrogation under 18 U.S.C. §§2340-2340A." The second, substantially redacted memo responded to the CIA's request for review of interrogation tactics proposed for Al-Qaeda members, which included waterboarding. Given the prominence of Bybee/Yoo's first memo, it will be our focus here.[66]

Ever since its release in June 2004, the first Bybee memo has generated an enormous amount of commentary. After a short introduction, Yoo asserted that the federal anti-torture statute "requires that severe pain and suffering must be inflicted with specific intent" before a defendant's conduct rises to the level of torture. Further, Yoo held that the defendant "must expressly intend to achieve the forbidden act."[67] Without this "specific intent to inflict severe pain" as the "defendant's precise objective," the activity would not legally qualify as torture. Yoo could have stopped at this point, and simply concluded that the kind of interrogation contemplated by the White House would not be illegal under federal law, so long as interrogators did not specifically intend to cause severe pain as their primary objective. For Yoo, however, the problem was that a jury might nonetheless find a specific intent to torture, insofar as juries "are permitted to infer from the factual circumstances that such intent is present."[68] In other words, the "golden shield" of immunity could be pierced. How could the shield be reinforced? Yoo's strategy was to argue that the federal statute did not apply to the proposed interrogation techniques. He buttressed his argument with an un-

justifiably narrow construction of "torture," defined as physical pain of a severity "that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions . . . ."[69] Similarly, before the infliction of mental pain fulfilled the requirements for torture under the federal statute, it had to "result in significant psychological harm of significant duration, e.g., lasting for months or even years." Yoo's restrictive reading—one might, without exaggeration, call it an evisceration—of the anti-torture statute effectively sanctioned a wide range of extreme forms of coercive interrogation, among them waterboarding.

Of course, the danger remained that another branch of the government would see things differently. The federal judiciary, a constant irritant for Yoo and other Bush officials, might insist on enforcing §2340A by prosecuting interrogators for violating the statute. Yoo's analysis of this potential difficulty illumines the ideological matrix behind not only the American detainee program under Bush, but the Administration's political worldview as a whole. According to Yoo, the anti-torture statute would be unconstitutional as applied if "it impermissibly encroached on the President's constitutional power to conduct a military campaign." He continued:

> As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. . . . In such a case, the information gained from interrogators may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.[70]

In defending the country against terrorism, the Administration could act without fear of interference from coordinate branches of government. From the rule of law it had nothing to fear, insofar as the President's actions on behalf of national security in a time of war were immune to judicial or legislative review. In devising a special law to extract information from enemy combatants, the White House could be neither challenged nor restrained. Everything short of an interrogator's sadistic revelry in the torment of a detainee was allowed. The only force inhibiting the exercise of presidential authority was the President himself.[71]

The Yoo/Bybee memos of August 1, 2002, exerted a direct influence on the evolution of American torture at Guantanamo Bay. As pressure from the White House to "get tough" with detainee questioning mounted in October 2002,* Gitmo staff met with the CIA's Counter-Terrorist Center chief counsel, Jona-

---

* The Guantanamo Bay Staff Judge Advocate at the time, Diane Beaver, related that the pressure to use more aggressive techniques was palpable by the late summer of 2002. Although its provenance was unclear to her, she sensed that the pressure came from Washington. Philippe Sands quotes the testimony of a section chief within the Defense Intelligence Agency as corroboration for Beaver's intuition: he reported in an Army investigation that the push for enhanced interrogation in October 2002 was "a direct result of the pressure we felt from Washington to obtain intelligence and the lack of policy guidance being issued by Washington." Quoted in SANDS, 61.

than Fredman, to discuss aggressive techniques culled from the SERE program, among them sleep deprivation, death threats, and waterboarding. Participants in the meeting looked toward Fredman for legal advice on the applicability of anti-torture statutes. He replied in words fraught with the legal subterfuges of Yoo: "the language of the statutes is written vaguely. . . . Severe physical pain described as anything causing permanent damage to major organs or body parts. Mental torture [is] described as anything leading to permanent, profound damage to the senses or personality." Stepping outside Yoo's chimerical thought-world for a moment, Fredman said plainly: "It is basically subject to perception. If the detainee dies you're doing it wrong."[72]

IV. American torture in historical perspective: Uniqueness or comparability?

The preceding account is only part of the story of American torture. Much more was to follow, including two authorizations of extreme interrogation techniques by Donald Rumsfeld [the first in early December 2002, the second in April 2003]. The first authorization, providing the green light to 20 hour interrogations, deprivation of light and auditory stimuli, removal of clothing, exploitation of phobias (such as dogs), and stress positions for up to four hours, led directly to preparation of a "Standard Operating Procedure" (SOP) at Guantanamo Bay in December 2002. The "premise" of the SOP, in its own words, was to approve the use of the SERE program tactics "to break real detainees during interrogation." The SOP was a how-to manual on slapping, stripping, and placing into stress positions detainees at Guantanamo, and mentioned other SERE techniques like "hooding," "manhandling," and "walling," that is, smashing against concrete walls.[73] The Rumsfeld authorization and the SOP following it triggered application of these techniques to Mohammed al-Khatani, whose interrogation began at Guantanamo on November 23, 2002, and continued until mid-January, 2003. The Red Cross documented other cases of what it called "torture and/or cruel, inhuman or degrading treatment" on thirteen other detainees at secret CIA locations scattered across the world. For the Red Cross investigators, "the consistency of the detailed allegations provided separately by each of the fourteen adds particular weight to the information."[74] From these accounts, Mark Danner has observed, "a clear method emerges . . . , based on forced nudity, isolation, bombardment with noise and light, deprivation of sleep and food, and repeated beatings and 'smashings'."[75]

We now know that the methods solicited, contrived, and approved by Bush officials migrated to Afghanistan when Rumsfeld's December 2002 authorization was sent there from Guantanamo sometime during that month. Proving the truth of Justice Holmes's proverb that you cannot unring a bell, Rumsfeld's subsequent retraction of his authorization had little effect on the interrogation program. Military interrogators in Afghanistan acting under color of the Rumsfeld memo adopted the Guantanamo techniques in January 2003, including forced nudity and "exploiting the Arab fear of dogs." The techniques then spread to Iraq after the U.S. invasion of that country. According to a DoD Inspector General report,

special forces in Iraq relied on an Afghanistan SOP from January 2003, which was in turn influenced by the "counterresistance" techniques approved in Rumsfeld's December 2002 memorandum. The Afghanistan SOP

> incorporated techniques designed for detainees who were identified as unlawful combatants. Subsequent battlefield interrogation SOPs included techniques such as yelling, loud music, and light control, environmental manipulation, sleep deprivation/adjustment, stress positions, 20-hour interrogations, and controlled fear (muzzled dogs) [. . .]

By the summer of 2003, Captain Carolyn Wood, the Interrogation Officer in Charge at Abu Ghraib, submitted the JPRA/SERE techniques to her superiors as the proposed basis for all interrogation policy by U.S. forces in Iraq. On September 14, 2003, following an August visit by the Guantanamo commander, Geoffrey Miller, the U.S. Commander in Iraq issued the command's first interrogation SOP. It authorized the familiar litany of stress positions, sleep deprivation, environmental manipulation, and the use of dogs.[76]

Despite efforts to distance themselves from the Abu Ghraib photos that exploded into world notoriety in May 2004, high-ranking Bush officials were intimately involved in crafting these interrogation methods and pressuring intelligence officers in the CIA and military to use them. While they continue to express regret about Abu Ghraib, former Bush policymakers not only admit their involvement in the "enhanced interrogation" program, but, as with former Vice President Dick Cheney, adamantly defend it as necessary to protect Americans against terrorist attacks. Clearly, the American program was not the work of a "few bad apples," as Bush officials initially claimed; it was a modern example of atrocity by policy, committed not by trenchcoated Gestapo heavies or SA thugs* but by trained professionals of the world's leading democracy.

This point cuts to the heart of how American torture compares with earlier forms. From early on in Western history, declaration of a state of emergency has been the justification for creating an exception to immunity from torture. This was true for Rome's "new jurisprudence," which vacated free men's exemption from torture when charged with the crime of treason, as it was in the development of Medieval "extraordinary procedure" for *crimina excepta* ("exceptional crimes") believed to threaten the community's survival, like witchcraft, treason, and heresy. The cosmic importance of racial purity and revolutionary orthodoxy cemented torture as a routine part of police interrogation in totalitarian societies, which created special law to deal with alleged bearers of dangerous tendencies. In Algeria, France applied torture in response to the emergency it confronted in maintaining a rapidly crumbling empire—and the blows to national self-esteem signified by that empire's potential loss. Prodded by Bush's declaration of a national emergency after 9/11 and continual invocations of the dangers of another terrorist attack, the USA has recently walked down this path. Government's success in manipulating fear among its citizens is a constant refrain in each of these histories of torture.

---

* The SA was the *Sturmabteilung* or Nazi Storm Troopers.

It is tempting to liken American torture to that of the French in Algeria. Both were Western democracies responding to Muslim insurgencies; both used torture to extract information from detainees branded as terrorists. Yet, upon further study, the American example differs markedly from the French. While Paris enabled torture by the French army, it did not originate the interrogation program, pressure subordinates into implementing it, or strenuously defend it after the fact as necessary to protect vital national interests. The Bush Administration, by contrast, did all of these things. So far as we can tell, French torture was the product of an army that had achieved virtual independence of the government during the Algerian war. The Bush Administration, on the other hand, was the proud parent of American torture. Paris never arrogated to itself superior power relative to other government branches, nor elevated itself above domestic and international law. Time and again, in court briefs, internal memoranda, and public speeches, the Bush Administration claimed an exalted status in the American scheme of government that, had it succeeded, would have made the White House absolute and unchallengeable as the country's defender against terrorism. The analogy between American and French torture breaks down on close analysis.

Instead, the regime of torture under Bush more closely resembles—if in relatively modest degree—totalitarian regimes. Where the French, eager to staunch further decolonization, departed momentarily from the dignity of human life proclaimed by the Enlightenment, Bush officials exploited the fears and confusion of 9/11 to launch their assault on human rights and the rule of law. The conservatism of the Administration was a political ideology opposed to the 18th century doctrine of natural rights. Its visceral distaste for the values of Enlightenment culture positions Bush torture closer to totalitarianism than to France during the Algerian war. Bush's conception of the "global war on terror" was itself a proto-totalitarian construct. Like all "wars on nouns," to lift a phrase from Philip Zimbardo,[77] a "war on terror" is potentially never ending—meaning that the special law devised to deal with the emergency will also be neverending, and hence normalized. Normalization of the abnormal, transformation of special law into ordinary law, the conversion of a state of emergency into conventional practice—all are the telltale insignia of totalitarian government. And at the center of this obliteration of law is the enemy combatant. The bearer of dangerous tendencies, he is subjected to all the indignities and terrors of special law, from indefinite detention to trials in sham courts to torture. Whether or not he has committed a crime is not the issue (intelligence officers informed the Red Cross in 2004 that between 70 and 90 percent of detainees in Iraq were not involved in terrorism);[78] the enemy combatant is divested of legal protections in the name of national security, regardless of what he has or has not done.

After George W. Bush suspended the Geneva Conventions in February 2002, John Yoo, who had significantly affected Bush's decision, offered a pithy summary of the White House's intentions. "What the Administration is trying to do is create a new legal regime," he said in a comment that rang through the international press.[79] To accomplish this aim was no small matter: more than a

century of American adherence to the Laws of War had to be re-shaped. One had to speak the scripture of human rights in reverse and unmake a world; for this, a space was needed. Because the federal courts might meddle in the President's detention of enemy combatants' within U.S. territory, they were confined in detention centers across the globe. Many were secret; others, like Guantanamo Bay, were not. What they all had in common was their imperviousness to U.S. and international law. They all shared the basic attribute of their model, Guantanamo Bay, which American federal courts had long held was not American territory, and would therefore be outside the reach of federal court jurisdiction.[80] In a series of defeats for Bush officials, the U.S. Supreme Court rebuffed their efforts to obstruct federal judicial review of Guantanamo detainees' imprisonment.[81] Nonetheless, the fact remains that the Administration was for a time successful in creating a space governed purely by the whim of unaccountable executive power—a Miltonian pandemonium of lawlessness, the photographic negative of the Enlightenment ideals of human dignity, fair treatment, and inviolable rights. The projection into the world of lawless spaces ruled by special law, which is in reality the negation of all law, was the deadly endgame of Bush officials.[82]

Sigmund Freud, a believer in the Enlightenment project of human freedom, wrote that the purpose of psychoanalysis was to let "ego" (reason, self-understanding) prevail where "id" (irrationality) had previously reigned.[83] The USA under Bush inverted the order of Freud's ambition: reason and restraint were ousted in favor of the dark passions of unchecked power. As this inversion was remaking the landscape of American law, the country remained a functioning, if wounded and insecure, democracy. We have arrived at the extraordinary paradox of American torture, the quality that establishes its uniqueness in modern Western history. In seeking to defend its democracy, the country's leadership resorted to tactics and ideologies reminiscent of totalitarian governments. Through its policies of officially sanctioned torture, the world's leading democracy became the very watchword of repression and terror.

NOTES

1. G. W. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 13 (1962).
2. On the contentious debates among German intellectuals over the meaning of modern German history, *see* C. S. MAIER, THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY (1988); I. KERSHAW, THE NAZI DICTATORSHIP: PROBLEMS AND PERSPECTIVES OF INTERPRETATION (1994).
3. Some of the leading historians of the 20th century have underscored the importance of comparison for eliciting not only the similarities between two historical events, but—of equal importance—their differences; *see* Marc Bloch, *Pour une histoire comparée des sociétés européenes, in* MÉLANGES HISTORIQUES 16-40 (1963); Karl Dietrich Bracher, *Zeitgeschichtliche Erfahrungen als aktuelles Problem*, *in* AUS POLITIK UND ZEIGESCHICHTE (1987); C. S. MAIER, *supra* note 2, at 70.
4. *See infra* p. 40.
5. *See infra* pp. 46 ff.
6. *See* The ICRC Report on the Treatment of Fourteen "High Value" Detainees in CIA Custody, *available at* www.nybooks.com.

7. J. LANGBEIN, TORTURE AND THE LAW OF PROOF 3 (2nd ed. 2006).
8. This definition intentionally excludes more metaphorical uses of the word "torture" that equate it with extreme forms of punishment or mistreatment.
9. ARISTOTLE, RHETORIC, *in* THE RHETORIC AND THE POETICS OF ARISTOTLE 88 (1954).
10. E. PETERS, TORTURE 33 (1985).
11. *Id.*, ch. 2; LANGBEIN, *supra* note 7, at 4-8.
12. PETERS, *supra* note 10, at 63-64.
13. These cases, which included accusations of heresy, magic, counterfeiting, homicide, and treason, were called *crimina excepta*, or "exceptional crimes." As in other times and cultures, among them the USA during the "Global War on Terror," the exceptional nature of these crimes burst asunder the restraints on state power offered by the ordinary system. *See* PETERS, *supra* note 10, at 66; LANGBEIN, *supra* note 7, at 16-17.
14. LANGBEIN, *supra* note 7, 16-17. The *torture prèparatoire* was distinguished from the *torture prèalable* (literally, "preliminary torture"), which was carried out on the convict awaiting execution. Its purpose was to generate information from the doomed person about other crimes or the identities of his accomplices.
15. The Enlightenment-oriented school consists *inter alia* of Henry C. Lea, W. E. H. Lecky, A. D. White, and J. Gilissen.
16. On Langbein's account, for example, the emergence of the *Verdachtsstrafe* ("punishment on suspicion") enabled a judge to punish a suspect whom he believed guilty based on circumstantial evidence, even when evidence of guilt failed to meet the requirements of the canon law of proof. This "free judicial evaluation of the evidence" (*freie Beweiswürdigung*) freed European courts from the need to produce a confession, thereby eliminating the grounds for torture. LANGBEIN, *supra* note 7, at 48-49.
17. PIERRE-HENRI SIMON, CONTRE LA TORTURE (1957), *quoted in* PETERS, *supra* note 10, at 101.
18. A. MELLOR, JE DÉNONCE LA TORTURE (1972), *cited in* PETERS, *supra* note 10, at 106. Of Mellor's three explanations for the resurgence of torture in the 20th century, I only find the first two—the rise of totalitarian political systems and national security states—persuasive. The third, "Asianism," will not be addressed in this essay.
19. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). On the death-dealing effects of legal language qua speech acts, *see* R. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).
20. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 424 nn. 95 & 96 (1968).
21. *Id.*, n.95. Arendt acutely observes that the actual identity of the objective enemy is of secondary importance; if it were not, then totalitarian politics, after eliminating its objective enemies, would return to a condition approaching equilibrium. This is not the case for totalitarian regimes, which restlessly manufacture new enemies to replace the old ones as society careens from one mass mobilization to the next in a ceaseless outwelling of persecution and destruction.
22. *Id.*
23. I. KERSHAW, HITLER 1889-1936: HUBRIS (1998) 457-460.
24. Article 48 of the German Constitution of August 11, 1919, required that the Reich President's Decree be withdrawn once the emergency supporting its issuance had passed. The decrees of 1933 are available at http://web.jjay.cuny.edu/~jobrien/reference/ob60.html.
25. The centrality of the state of emergency to the theory and practice of National Socialism cannot be overstated. The German historian of Nazi law, Ingo Müller, writes that Hitler entitled the final chapter of *Mein Kampf* "The Right of Self-Defense," while the fellow traveling jurist Carl Schmitt referred to the Enabling Act of 1933 as "the temporary constitution of the Third Reich." For Müller, indeed, "the doctrine of 'national emergency' came to be used

as a justification for everything the National Socialist regime did." I. MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 24 (1991).

26. On the implications of this process for legal equality in Nazi Germany, *see* D. MAJER, "NON-GERMANS" UNDER THE THIRD REICH 45 (2003).
27. *Quoted in* PETERS, *supra* note 10, at 129-30.
28. MAJER, *supra* note 6, at 47. For Majer, "universal and general inequality" was the "decisive structural element" of the entire National Socialist system of government. Years ago, as an exchange student in West Germany, I visited the site of the former Buchenwald concentration camp in East Germany near Weimar. Inscribed on the gates of Buchenwald was a curious motto: "Jedem das Seinem" (roughly translated as "to each, that which he deserves"). I was mystified by this cryptic phrase until Majer clarified its meaning. It relates to the Nazis' view that the principle of legal equality applied not to all persons in society, but only among individuals within groups. For the Nazis, individual differences based on race were an ontological truth, entailing that the law treat individuals differently based on their racial makeup. This form of totalitarian doublespeak meant that "true meaningful equality" was legal inequality between racial superiors and inferiors. The only equality before the law existed as between persons within groups ranked on the Nazis' racial hierarchy.
29. M. BURLEIGH, THE THIRD REICH 176-177 (2000); G. BROWDER, FOUNDATIONS OF THE NAZI POLICE STATE 234-35 (1990).
30. BURLEIGH, *supra* note 29, at 184. For an extended firsthand account of Gestapo torture in 1936, *see* DEUTSCHLAND-BERICHTE DER SOZIALDEMOKRATISCHEN PARTEI DEUTSCHLANDS (SOPADE) 49-53 (1936) (recounting the coercive interrogation of a Social Democratic detainee).
31. J. GLOVER, HUMANITY 239-40 (1999). On the systematic use of torture under Stalin, *see* R. CONQUEST, THE GREAT TERROR 121-31 (1990).
32. *Id.*
33. GLOVER, *supra* note 31, at 240.
34. The German scholar of Nazi criminality, Herbert Jäger, writes that prisoners at Auschwitz—particularly ones suspected of connections with partisans—were tortured to death through "enhanced interrogation" (*verschärfte Vernehmung*)—a phrase that has gained notoriety in reference to American interrogations during the Bush era. H. JÄGER, VERBRECHEN UNTER TOTALITÄRER HERRSCHAFT 32 n.31 (1967), citing the testimony of Wilhelm Boger from the West German Auschwitz trial. For a moving first-person narrative of Gestapo torture in France during the war, *see* J. AMERY, AT THE MIND'S LIMITS 21-40 (1980).
35. *See supra* p. 38.
36. A. HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954-1962 196 (2006); PETERS, *supra* note 10, at 132-140. In his research, Mellor attested he found no evidence of French police torture before 1929. On the American Third Degree, see R. POHLENBERG, FIGHTING FAITHS 68 (1987); Skolnick, *American Interrogation from Torture to Trickery*, *in* TORTURE: A COLLECTION 105, 112 (S. Levinson ed. 2004). The American Third Degree arose within a context of local policing unsupervised by higher political authority. When publicized in the late 1920s–early 1930s, the practice elicited state and federal investigations and widespread condemnation in American law journals.
37. Y. BEIGBEDER, JUDGING WAR CRIMES AND TORTURE: FRENCH JUSTICE AND INTERNATIONAL CRIMINAL TRIBUNALS AND COMMISSIONS (1940-2005) 95-96 (2006).
38. *Id.*
39. *Id.*, 101; HORNE, *supra* note 36, at 149-50.
40. BEIGBEDER, *supra* note 37, at 117.
41. HORNE, *supra* note 36, at 199.
42. *Id.*
43. *Id.*, 200. For one torture survivor's harrowing account of the *gégène* and water torture, *see* H. ALLEG, LA QUESTION (1958) and the episodes recounted in HORNE, *supra* note 36.

44. BEIGBEDER, *supra* note 37, at 117-18. Long before Aussaresse published his estimate, Paul Teitgen, the former secretary-general of the Algiers prefecture, offered a comparable figure, asserting that the disappearances were in excess of 3,000 detainees.
45. HORNE, *supra* note 36, at 201.
46. On military drift as a dangerous concomitant of warfare, *see* GLOVER, *supra* note 21, at 75-76, 189.
47. BEIGBEDER, *supra* note 37, at 102-03.
48. The duplicitous representations of Bush administration officials in May and June 2004 are described in P. SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 18-22 (2008).
49. C. JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC 36 (2006). For Johnson, Bush's subsequent denial of Geneva Convention protections to Al Qaeda and Taliban detainees was motivated by a concern to immunize CIA agents against prosecution for actions authorized under the September 17 directive.
50. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, *available at* http://www.torturingdemocracy.org/documents/20011113.pdf.
51. *Id.* The order defined an "individual subject" to the order as a non-U.S. citizen determined by Bush to (i) be a current or former member of al Qaeda, (ii) be engaged in harming, or threatening to harm, U.S. interests, or (iii) have knowingly harboured persons described under (i) and (ii).
52. On the events of December and January 2001-02, *see* SANDS, *supra* note 48, at 31-36; Memorandum for the Joint Chiefs of Staff, January 19, 2002, *available at* http://www.torturingdemocracy.org/documents/20020119.pdf.
53. Sands reports that Cheney's counsel, David Addington, was the real author of the memo, and that Gonzales had signed his name to it. SANDS, *supra* note 48, at 32.
54. Memorandum for the President, January 25, 2002, *available at* http://www.torturingdemocracy.org/documents/20020125.pdf.
55. Memorandum for the Vice President et al., February 7, 2002, *available at* http://www.torturingdemocracy.org/documents/20020207-2.pdf.
56. 317 U.S. 1 (1942). The constitutional scholar Ronald Dworkin regards *Quirin*, much like the Supreme Court's *Korematsu* verdict upholding detention of Japanese Americans during the war, as "overly deferential to the executive and, in a crucial part, wrong," noting that Felix Frankfurter implored his colleagues to affirm FDR's use of a military commission in support of the war effort. *See* R. Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, February 28, 2002, at 44, 47.
57. J. Mayer, *The Hard Cases*, THE NEW YORKER, February 23, 2009, at 38.
58. Quoted in K. Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. Const. L. 1001, 1053 n.208 (2003-2004). The government's brief is available at http://news.findlaw.com/hdocs/docs/hamdi/hamdirums120303gopp.pdf.
59. Scheppele, *supra* note 58, at 1049. The government's brief is available at http://new.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf.
60. One of the sources of these techniques was Chinese interrogation practice during the Korean war to extract false confessions from U.S. POWs. Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, December 11, 2008, xiii, *available at* http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20081211.pdf.
61. *Id*., xiii-xiv.
62. M. Danner, *U.S. Torture: Voices from the Black Sites*, N.Y. REV. OF BOOKS, April 9, 2009, at 69, 73.
63. J. Greenburg, H. Rosenberg, and A. De Vogue, *Sources: Top Bush Advisors Approve "Enhanced Interrogation*," ABC NEWS, April 9, 2008; Danner, *supra* note 62, at 73.

64. The metaphor of the "golden shield" was used by administration officials to denote legal immunity from prosecution for participating in "enhanced interrogation." *See* Danner, *supra* note 62, at 73.
65. SANDS, *supra* note 48, at 73.
66. The second memo of August 1, 2002, approved a list of hitherto classified techniques proposed by the CIA, including waterboarding. In testimony before the House Judiciary Committee in February 2008, Assistant Attorney General Steven Bradbury said that the CIA "adapted [waterboarding] from the SERE training program." Senate Armed Services Inquiry, *supra* note 60, at xvi.
67. Memorandum for Alberto Gonzales, Counsel to the President, August 1, 2002, 1, 3-7, *available at* http://www.torturingdemocracy.org/documents/20020801-1.pdf.
68. *Id.*
69. *Id. See also* SANDS, *supra* note 48, at 72-75; D. Cole, *What Bush Wants to Hear*, N.Y. REV. OF BOOKS, November 17, 2005, at 10-11; Senate Armed Services Committee Inquiry, *supra* note 60, at xv; Danner, *supra* note 62, at 73.
70. Memo for Gonzales, *supra* note 67, at 31.
71. Yoo sets forth his theory of the "unitary executive" in two books: THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2006) and WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006). The "torture memo" sets forth a distilled version of the theory on pages 36-39.
72. Senate Armed Services Committee Inquiry, *supra* note 60, at xvii.
73. *Id.*, xx. *See also* The ICRC Report, *supra* note 6, at 11.
74. The ICRC Report, *supra* note 6, at 5.
75. Danner, *supra* note 62, at 74.
76. Senate Armed Services Inquiry, *supra* note 60, at xxii-xxiv.
77. P. ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 430 (2007).
78. Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Persons Protected by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation, February 2004, *available at* http://www.scvhistory.com/scvhistory/signal/iraq/ghraib-icrc-0204.htm. Similarly, the Commanding Officer of Joint Task Force 170 at Guantanamo Bay, Major General Michael Dunlavey, estimated that one-half of the detainees delivered to Gitmo in the winter of 2002 had been mistakenly arrested. The same percentage, according to Dunlavey, had no intelligence value. SANDS, *supra* note 48, at 43.
79. *See, e.g.*, SYDNEY MORNING HERALD, May 17, 2002.
80. See Bird v. U. S., 923 F. Supp. 338 (D. Conn. 1996), Cuban Am. Bar Ass'n v. Christopher, 43 F.3d (11th Cir. 1995), 35 Op. Att'y Gen. 536 (1929), and 6 Op. Off. Legal Counsel 236 (1982), *cited in* SCHEPPELE, *supra* note 58, at 1056-1057.
81. *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamden v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. ___ (2008).
82. On the administration's creation of a "global gulag" dedicated to CIA torture and interrogation, *see* A. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 116 (2006).
83. S. FREUD, *New Introductory Lectures on Psychoanalysis*, in 3 THE MAJOR WORKS OF SIGMUND FREUD 488 (1983).

ALAN CLARKE

BOOK REVIEW: *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE*

Edited, With Introductory Commentary by David Cole.
New York, London: The New Press, 2009. 304 pages.

Thoughtful legal scholars vigorously condemned the "torture memos" issued by the "torture lawyers" of the Office of Legal Counsel (OLC) during the Bush administration. These legal opinions, informed critics argued, were manifestly erroneous,[1] and in bad faith,[2] by out-of-control,[3] rogue operators.[4] The critics called for prosecution[5] or, failing that, disbarment,[6] or termination from employment.[7] Justice Department lawyers, they further argued, consciously sought to distort the law to justify the unjustifiable: out-and-out torture and its pitiless lesser cousin cruel, inhuman and degrading (CID) interrogation. Until recently, however, proof seemed debatable; it remained for *The Torture Memos* to fill that gap. This remarkable little paperback does two things:

1) It publishes for the first time, in one place, six previously secret opinions by the OLC which provide the first full account of just what these administration lawyers were trying to do; and
2) David Cole's introductory essay demonstrates that the OLC lawyers cannot have acted in good faith.

The strength of Cole's new book is that it, more persuasively than any other to date, makes the case that the OLC was, at least for a time, a rogue institution, its lawyers acting not as legal advisors but rather as the facilitators of torture and cruel, inhuman and degrading treatment. He makes the strongest case yet that these administration lawyers conspired to justify the manifestly unlawful; that the most important legal office in the land acted in bad faith. It is a stunning indictment.

As Cole points out, these torture lawyers continued to distort the law in the direction of permitting torture long after the immediate panic of the attacks of 9/11 had worn off. More importantly, these secret opinions continued to rationalize torture long after the "law in public appeared to tighten its standards to prohibit these tactics."[8] Indeed, the torture lawyers deliberately mislead the public in that they withdrew some of the more controversial early opinions, even while preserving the bottom line by approving every single one of the CIA's abusive interrogation techniques.[9] Not only were OLC lawyers acting in bad faith, they deceived both the Congress and the public into thinking that interrogation practices had changed when they had not.

One of Cole's most devastating critiques revolves around the OLC's justificatory reasoning. The OLC subscribed to a sliding scale test for evaluating whether particular interrogation practices, such as waterboarding and sleep deprivation,

---

Alan W. Clarke, is Professor of Integrated Studies, at Utah Valley University,

used either singly, repeatedly or in combination would "shock the conscience, thereby violating due process. They opined that the greater the government's interest in, and need for, information, the less likely the conduct would be considered to be either torture or cruel, inhuman or degrading treatment (CID). In discussing the "shocks the conscience" test, Stephen G. Bradbury, Principal Deputy Assistant Attorney General argues, "[f]ar from being constitutionally arbitrary, the interrogation techniques at issue here are employed by the CIA only as reasonably deemed necessary to protect against grave threats to United States interests …"[10] His memorandum concludes:

> Given that the CIA interrogation program is carefully limited to further the Government's paramount interest in protecting the Nation while avoiding unnecessary or serious harm, we conclude that the interrogation program cannot "be said to shock the contemporary conscience" when considered in light of "traditional executive behavior" and "contemporary practice."[11]

The OLC concluded that, because the perceived need was great, a host of harsh interrogation techniques (including waterboarding) were neither torture nor CID, and moreover, that the use of such techniques did not shock the conscience even when used repeatedly[12] or in combination with any or all of such OLC approved techniques, on a single subject over a 30 day period.[13] Nor did the OLC think that use of these techniques could be characterized as causing severe pain.[14]

Cole tackles the question of whether the OLC's interpretation of the "shocks the conscience" test is a fair reading of Supreme Court precedent. He convincingly demonstrates that the OLC's reading of the law is plainly erroneous.[15]

> The case law is clear that any intentional infliction of pain for interrogation purposes violates due process. And the Court has recognized no sliding scale that would permit the infliction of pain if the government's reason is good enough. … [t]he court has repeatedly found its conscience shocked where the government acted with wholly legitimate interests.[16]

Indeed, the OLC's approach is not simply wrong. Cole shows that when all of the newly disclosed memoranda are read together it becomes apparent that they were not written in good faith.

> Precisely because the questions were so difficult… one would expect a good-faith analysis to reach a nuanced conclusion, perhaps approving some measures while definitely prohibiting others. Yet on every question, no matter how much the law had to be stretched, the OLC lawyers reached the same result – The CIA could do whatever it had proposed to do.[17]

He points out that in *Chavez v. Martinez*[18] (a case cited by the OLC)[19] even Justice Thomas, who did not think that due process had been violated on the facts of the case, concluded "the deliberate infliction of pain on an individual to compel him to talk would shock the conscience."[20] Thus, even one of the most conservative Supreme Court Justices, while not being shocked by an interrogation of a man apparently in excruciating pain,[21] would halt at the deliberate infliction of pain. Moreover, contrary to the views of Justice Thomas, the majority opinion

on the Court was that "any use of pain to compel a suspect to talk violated due process."[22] If any use of pain shocks the conscience, then the argument is even stronger as to the deliberate and repeated use of painful interrogation techniques, used in combination, and over as many as 30 days at a time.

Given the revelation of these formerly secret memoranda, and Cole's cogent analysis thereof, it is no longer possible to see the OLC's position as plausible. And if not plausible, then the good faith of the OLC lawyers is placed squarely in question. Cole accurately describes the Bush administration's misreading of the law, (articulated publicly by Vice President Cheney,[23] Senator John McCain,[24] and former Attorney General Mukasey[25]) and proceeds to completely deconstruct the attempted justification for practices that, under any sensible understanding of the English language, count as torture.

However, what truly shocks the conscience is the specious argument that torture can somehow be deemed legitimate. That otherwise sober people, intending to be taken seriously, made such arguments is indeed cause for shame. David Cole does all Americans a service by demonstrating that stretching the law to justify torture cannot be defended; that the OLC lawyers were not on a professional quest to determine the law; that, on the contrary, they acted in bad faith dishonoring us all. As Cole puts it:

> When considered as a whole, the memos read not as an objective assessment of what the law permits or precludes, but as a strained effort to rationalize a predetermined—and illegal—result. Rather than demand that the CIA conform its conduct to the law, the lawyers contorted the law to conform it to the CIA's desires.[26]

Cole does not follow this to what might seem the logical conclusion: prosecution of the torture lawyers. He points out that a legal showing of bad faith beyond a reasonable doubt in a criminal court, even on these facts, would be difficult. Instead he calls for a formal investigation which, "[d]epending on the facts that emerge," could result in "disbarment proceedings, civil damages actions, or criminal prosecution."[27]

We await responses to Cole's call for accountability. The fact that it has not happened, and does not seem likely, says more about current U.S. politics than it does of Cole's analysis.

NOTES

1. Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1546–67 (2009).
2. Posting of Brian Tamanaha, *The Collapse of the "Good Faith" Excuse for Yoo (Bybee, Delahunty),* to BALKINIZATION, *at* http://balkin.blogspot.com/2009/03/collapse-of-good-faith-excuse-for-yoo.html (Mar. 5, 2009, 4:46 EST).
3. Michael Isikoff and Evan Thomas report that a former aide to Attorney General John Ashcroft has said that one lawyer with the Office of Legal Counsel, John Yoo, was seen as a rogue operator inside the Justice Department who was "out of control." Michael Isikoff & Evan Thomas, *Bush's Monica Problem*, NEWSWEEK, June 4, 2007, at 27.

4. Alan W. Clarke, *De-Cloaking Torture, Boumediene and the Military Commissions Act*, 11 SAN DIEGO INT'L L.J. 59, 82 (2009).
5. Paust, *supra* note 1, at 1546.
6. Clarke, *supra* note 4, at 82.
7. The National Lawyer's Guild has called on Boalt Hall Law School to dismiss one of the OLC lawyers most directly connected with the early torture memoranda to be dismissed from his tenured faculty position at the law school on the ground that his "complicity in establishing the policy that led to the torture of prisoners constitutes a war crime under the US War Crimes Act" according to Guild President, Marjorie Cohn. *National Lawyers Guild Calls on Boalt Hall to Dismiss Law Professor John Yoo, Whose Torture Memos Led to Commission of War Crimes*, *at* http://buelahman.wordpress.com/2008/04/09/national-lawyers-guild-says-john-yoo-is-a-war-criminal/ (Apr. 9, 2008, 17:05 EST).
8. DAVID COLE, THE TORTURE MEMOS 4 (2009).
9. *Id*.
10. Memorandum from Steven G. Bradbury, Principle Deputy Assistant Attorney General to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005) (on file with author), Cole, supra note 8, at 223, 227.
11. COLE, supra note 8, at 228.
12. OLC lawyers argue that, "[a]pplication [of the waterboard] are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period we consider." Cole supra note 8, at 195, reprinted in Memorandum from Steven G. Bradbury, Principle Deputy Assistant Attorney General to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005) (on file with author) (memorandum concerning the use of certain interrogation techniques), Cole, supra note 8 at 152
13. Memorandum from Steven G. Bradbury, Principle Deputy Assistant Attorney General to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005) (on file with author), COLE, *supra* note 8, at 199.
14. "However frightening the experience may be, OMS personnel have informed us that the waterboard technique is not physically painful." Cole, supra note 8, at 152 (Techniques memorandum), "stress positions" can "not reasonably be considered specifically intended to cause severe physical pain or mental pain or suffering." Id. at 181. The notion that these interrogation methods do not cause severe pain, even when used repeatedly and in combination, seems so clearly at odds with the common understanding of the word "pain" that no further attention will be given that particular strain of the OLC's opinions. It suffices to note that *Webster's New Universal Unabridged Dictionary* (1979) defines "pain" as "1. To cause uneasy sensations in; to torment … 2. To make uneasy; to distress." If the sensation of drowning caused by waterboarding does not fit this commonsense definition, nothing does. If stress positions, causing muscle fatigue to the point of collapse cannot be considered severe pain, then the words simply cease to have meaning. As the author's article, "Creating a Torture Culture," points out one SERE graduate describes waterboarding as "real drowning that simulates death" and the sensation one of "burning liquid" worse than "pulling out fingernails" or "cutting off a finger." Alan W. Clarke, *Creating a Torture Culture,* 32 SUFFOLK TRANSNAT'L L. REV. 1, 36 (2009). And, as the Director of National Intelligence, Mike McConnell says "[i]f I had water draining in my nose, oh God, I just can't imagine how painful."). *Id*. at 7.
15. COLE, *supra* note 8, at 32.
16. *Id*. at 32. David Cole goes on to discuss several Supreme Court cases demonstrating the OLC's overreach on this.
17. *Id*. at 4.
18. 538 U.S. 760, 774 (2003).
19. COLE, *supra* note 8, at 33.

20. *Id*.
21. In *Chavez*, the interrogators continued the interrogation of a man who had been shot and who was apparently in intense pain. They did not, however, initiate or cause the pain. The Supreme Court remanded to the lower courts to determine whether due process had been violated. Id. at 32-33.
22. *Id*. at 33.
23. Former Vice-President Dick Cheney is quoted as saying:

    You can get into a debate about what shocks the conscience and what is cruel and inhuman, and to some extent, I suppose, that's in the eye of the beholder. But I believe, and we think it's important to remember, that we are in a war against a group of individuals and terrorist organizations that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able to have effective interrogation of these people when we capture them. *McCain suggests torture ban has flexibility in imminent cases*, ASSOC. PRESS STATE & LOCAL WIRE (Dec. 18, 2005).
24. Former Presidential nominee and Senator John McCain, has said that waterboarding, mock executions and the like would not necessarily "shock the conscience" and could be used in some circumstances. "In that million-to-one situation, then the president of the United States would authorize it and take responsibility for it," *Id.*
25. Rosa Brooks, *U.S. attorney general nominee fails easy torture question*, SAN JOSE MERCURY NEWS, Nov. 2, 2007, *at* www.mercurynews.com/opinion/ci_7348998.
26. COLE, *supra* note 8, at 4.
27. *Id.* at 40.

sel Yoo gave the Bush administration and the abuse he suffered while in federal custody. On June 12, 2009 Yoo lost his motion alleging that Padilla's mother had stated a claim for which no relief can be granted.[4] The court very well may hear this case. It's also possible that criminal sanctions may still be in the offing as well, albeit in an international or foreign court. Justice Jackson made it clear in his opening argument at Nuremberg: state torture is the whole world's business, and a number of outraged nations, some of whose citizens have been have been interrogated after the Yoo and Bybee fashion, are taking aim at the torture lawyers. As Larry Wilkerson, Colin Powell's former chief of staff, has said of the so-called "Bush Six:" "Haynes, Feith, Yoo, Bybee, Gonzalez and… Addington, should never travel outside the U.S., except perhaps to Saudi Arabia and Israel. They broke the law; they violated their professional ethical code. In future, some government may build the case necessary to prosecute them in a foreign court, or in an international court."[5]

The National Lawyers Guild has been out in front demanding justice on this issue. We have repeatedly called for the war crimes prosecution of the torture lawyers and, on April 9, 2008, for Boalt Hall to end the disgraceful absurdity of John Yoo lecturing to our next generation of lawyers and legal scholars on the Constitution—a man who publicly averred that no treaty can prevent the president from crushing the testicles of an interrogatee's child and that the constitutionality of any statute banning such behavior "depends on why the President thinks he needs to do that"[6]

We continue to wait, neither patiently nor silently, for Justice Jackson's words to be realized—for the law to "reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."

One final note, this law review is changing its name. Starting next issue, it will be *National Lawyers Guild Review*, a title more precisely describing its content and purpose.

—Nathan Goetting, *Editor-in-chief*

NOTES

1. ROBERT H. JACKSON CENTER, SPEECHES BY ROBERT H. JACKSON, *The Call for a Liberal Bar*, *1937-1938*, *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-call-for-a-liberal-bar/.
2. ROBERT H. JACKSON CENTER, SPEECHES BY ROBERT H. JACKSON, *Opening Statement before the International Military Tribunal*, *1945-1971*, available at http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/.
3. David Luban, *David Margolis is Wrong*, SLATE, February 22, 2010, *at* http://www.slate.com/id/2245531/pagenum/all/#p2.
4. John Schwartz, *Judge Allows Civil Lawsuit Over Claims of Torture*, N.Y. TIMES, Jun. 13, 2009, *at* http://www.nytimes.com/2009/06/14/us/politics/14yoo.html?_r=1&ref=global-home.
5. Richard Norton-Taylor, *Top Bush Aides Pushed for Guantanamo Torture*, GUARDIAN (UK), Apr. 19, 2008, *at* http://www.guardian.co.uk/world/2008/apr/19/guantanamo.usa.
6. Sidney Blumenthal, *Meek, Mild and Menacing*, SALON, Jan. 12, 2006. *at* http://www.salon.com/news/opinion/blumenthal/2006/01/12/alito_bush/index.html.

Save the date!

The 2010 NLG LAW FOR THE PEOPLE Convention

will be held in

New Orleans, LA

September 22–26, 2010

◈

Details forthcoming at www.nlg.org

GUILD PRACTITIONER
132 NASSAU STREET, SUITE 922
NEW YORK, NY 10038

Periodicals
Postage Paid